Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

TOM SNYDER,

Petitioner,

v.

MURRAY CITY CORPORATION, a municipal corporation and H. CRAIG HALL, City Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If a city invites prayer and other invocational speech by private individuals at the beginning of city council meetings, does *Marsh v. Chambers*, 463 U.S. 783 (1983), allow the city to dictate the content of a proposed prayer without violating the Establishment Clause?

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The trial court granted summary judgment in favor of respondents. *Snyder v. Murray City Corp.*, 902 F. Supp. 1444 (D. Ut. 1995) [*"Snyder I"*] and *Snyder v. Murray City Corp.*, 902 F. Supp. 1455 (D. Ut. 1995) [*"Snyder II"*]. Appendix at 56a & 79a. A timely notice of appeal was filed. After oral argument before the Tenth Circuit Court of Appeals, a decision was rendered by a three judge panel on September 10, 1997. *Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997) [*"Snyder III"*]. Appendix at 87a. Petitioner filed a timely petition and was granted rehearing *en banc*.

JURISDICTION

The *en banc* opinion that is the subject of this petition, *Snyder v. Murray City Corp.*, No. 96-4087, 1998 U.S. App. LEXIS 27510 (10th Cir. Oct. 27, 1998) [*"Snyder IV"*], is set forth at Appendix 1a. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS IMPLICATED IN THIS CASE

Under 42 U.S.C. § 1983, petitioner/plaintiff, Tom Snyder (hereinafter "Snyder") sued the respondents/defendants Murray City and its city attorney, H. Craig Hall, (hereinafter "Hall") because the City refused to allow Snyder to offer a prayer before a city council meeting during the time set aside for such prayers. Snyder's claims sound in the First Amendment.

STATEMENT OF THE CASE

Murray City has a long standing practice that all City Council meetings start with a prayer. For more than fifteen years, Murray City has encouraged members of the public to offer such inspirational messages. According to city attorney, H. Craig Hall, anyone may offer prayers before the City Council as long as they do not mock policies of the City. *Snyder IV*, 1998 U.S. App. LEXIS 27510, at *8.

Murray City has no written guidelines or policies regarding the nature and/or content of prayers to be offered before its meetings. The administrative decisions as to: 1) who may offer a prayer before a City meeting; 2) the content of a prayer that may be offered; and, 3) whether a proposed prayer is appropriate and will be allowed to be presented are left to city attorney Hall's unfettered discretion. Hall's "guidelines" are that "the purpose of the 'prayer' is to allow individuals [the] opportunity to express thoughts, leave blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies." *Id.* at *8.

In June, 1994, Snyder wrote to Murray City asking to be allowed to present a prayer; he enclosed a copy of the prayer that he would present before a meeting of the City Council. *See id.* at *4 n.3. Snyder's prayer contains his religious beliefs and a message against public prayers sponsored and encouraged by government entities.

By letter, Hall informed Snyder that his prayer was "unacceptable" because of its contents and that Snyder could not participate in the Opening Ceremonies of a City Council meeting. Hall informed Snyder, "The text of the

proposed prayer is unacceptable. It does not follow the guidelines set forth in my [previous] letter . . . . Until your proposed prayer satisfies these guidelines, an invitation will not be forthcoming." *Id.* at *9.

Snyder's prayer, in format and content, is a prayer – asking that a deity influence the day-to-day affairs of humans and asking that God enforce particular religious, political and philosophical ideas or standards and guide government officials, give them wisdom, get their attention and make them do the right thing. Snyder's religious beliefs include philosophical ideas and political ideas. Snyder's prayer has the classic construct and substance of a prayer.

Snyder's prayer was rejected by Hall solely because of its content and for no other reason. According to Hall, Snyder's prayer did not meet any of his criteria. Hall considered the prayer as a whole and rejected it based upon content.

The majority decision of the *en banc* ruling grants governmental entities unrestricted power to censor the contents of prayers to be offered by members of the public before government meetings. The *en banc* decision sanctions the official development of what is acceptable public prayer offered by private citizens.

ARGUMENT

I. *MARSH V. CHAMBERS* DOES *NOT* PERMIT A CITY THAT INVITES PRAYER AND OTHER INVOCATIONAL SPEECH BY PRIVATE INDIVIDUALS AT THE START OF CITY COUNCIL MEETINGS TO CONTROL THE CONTENT OF A PROPOSED PRAYER WITHOUT VIOLATING THE ESTABLISHMENT CLAUSE.

The Court of Appeals interpretation of *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983) "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Court of Appeals based its decision on a unique interpretation of language in *Marsh*. The appellate court states that "*Marsh* . . . must be read as establishing the constitutional principle that a legislative body does not violate the Establishment Clause when it chooses a particular person to give its invocation prayers." *Snyder IV*, 1998 U.S. App. LEXIS 27510, at *21. According to the appellate court's interpretation of *Marsh*, the critical inquiry is "whether the prayer to be offered fits within the genre of legislative invocational prayer that 'has become part of the fabric of our society' and constitutes a 'tolerable acknowledgment of beliefs widely held among the people' ". *Id.* at *22-23 (citing *Marsh*, 463 U.S. at 792). An offering "falls outside the traditions of the genre and becomes intolerable . . . when 'the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.' " *Id.* at *23 (citing *Marsh*, 463 U.S. at 794-95).

However, *Marsh v. Chambers* does not allow such censorship of individuals' prayers. That case holds

broadly that prayers before government meetings do not violate the First Amendment. *Marsh* involved chaplains selected and paid by government. *Marsh* did not involve private citizens allowed to give prayers before a governmental meeting. *Marsh* suggests that content and nature of prayers by government selected and paid chaplains may be restricted in order to avoid Establishment Clause problems; however, nothing in *Marsh* holds or even suggests that government may dictate the contents of prayer offered by *private citizens* before a government meeting. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 2518-19 (1995) (where the government expends public funds to convey its own message, it may say what it wishes; where private speech is concerned, the government may not restrict expression on the basis of viewpoint).

Furthermore, *Marsh* does not allow for judicial evaluation of private prayers. Instead, *Marsh* suggests that the government could control the content of prayers by a *government appointee* and direct that an invocation by an appointed chaplain not exploit, proselytize, etc. *See Marsh*, 463 U.S. at 794-95; *see also Rosenberger*, 515 U.S. at 833-34. *Marsh* provides no direction as to what a court should do if confronted with a prayer from a private citizen which proselytizes, advances, or disparages.

Marsh notes that a government entity's practice in selecting persons to deliver prayers at public meetings may violate the Establishment Clause if the selections are the product of impermissible motives. *Marsh*, 463 U.S. at 793. That is what has occurred in the case at bar. Murray City selects and rejects prayers of private individuals solely based on the content of the prayers.

In addition, a government body's practices in selecting persons to deliver prayers at public meetings may violate the Establishment Clause if the selections advance a particular faith or disparage any faith or belief. *Id.* at 794-95. That is what has occurred in the case at bar. Murray City provides a state benefit – the opportunity to pray or recite inspirational remarks during its Opening Ceremonies – to only some religious practitioners. Murray City allows people to offer prayers, provided that those prayers are *approved* by the City. Those, like Snyder, who express non-traditional religious tenets, who question religious ideas or whose religious ideas include political thought are prevented from participating.

The Establishment Clause requires government neutrality between religions as well as between religion and non-religion. Thus, the City cannot refuse to allow Snyder to participate in the Opening Ceremonies because Snyder's message included political thought. Murray City cannot discriminate against Snyder because it finds his religious message is secular.[1]

If the City were to refuse to allow an atheist to offer the opening remarks, the City would clearly violate the Establishment Clause. The City would also violate the free speech protections of the First Amendment through viewpoint censorship. If Murray City in its designated

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[1] In Utah, even atheists must be allowed equal access and equal opportunity to express their views during a time set aside for "prayer" before a City Council meeting. *Society of Separationists v. Whitehead*, 870 P.2d 916, at 938 (Utah 1993).

limited public forum allows a person to say, "There is a God," the City must also allow a person to say, "There is no god." *Church on The Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996).

Marsh therefore is not controlling in this case. As noted, *Marsh* suggests that prayers of chaplains selected and paid by government may be restricted. Snyder challenges the action of the City rejecting his prayer while allowing, even encouraging, the prayers of others. Such discrimination between religious ideas constitutes the unconstitutional establishment of religion. "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." *United States v. Ballard*, 322 U.S. 78, 87 (1943). Because the Court of Appeals for the Tenth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court", certiorari should be granted. Sup. Ct. R. 10(c).

Furthermore, the *en banc* decision "has decided an important federal question in a way that conflicts with a decision by [Utah's] court of last resort . . . . " Sup. Ct. R. 10(a). In *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993), the Supreme Court of Utah examined a challenge to the Salt Lake City Council's practice of opening its meetings with a prayer. *Id.* at 938. While holding that the Utah state constitution does not prohibit a city council from opening its meetings with prayer, the court concluded that the council cannot "discriminate in the selection process, . . . preferring one group over [another] in violation of the constitutional principle of neutrality." *Id.* The *en banc* decision is in conflict with *Society of*

Separationists, and permits a city council to discriminate in its selection process of who may offer a prayer.

II. MURRAY CITY'S PRACTICE THAT ALL MEETINGS BEGIN WITH A PRAYER CONSTITUTES A DESIGNATED LIMITED PUBLIC FORUM.

Murray City has a long standing practice that all City Council meetings start with a prayer. *Snyder IV*, 1998 U.S. App. LEXIS 27510, at *3. The City has encouraged people to offer such inspirational messages. *Id.* at *3-4. The City has allowed any one and every one (except Snyder) to give a prayer or inspirational thought. *Id.* at *60. As a result, Murray City created a public forum for the purpose of offering a prayer or religious thoughts. *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (government created public forum for free speech must allow religious expression); *Widmar v. Vincent*, 454 U.S. 263 (1981); *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (allowing one religious group to erect a religious display while denying others and doing so without criteria, rules, and procedures is a violation of the Establishment Clause).

This Court stated:

> Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public

> forum close to the seat of government . . . in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate.*

Pinette, 515 U.S. 753, ___, 115 S. Ct. 2440, 2448-2449, 132 L. Ed. 2d 650 (1995) (emphasis in original).

"Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' " *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). A public forum may "be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. The policy and practice of the government determines if a setting has been opened as a designated limited public forum. *Id.*

Murray City invites a wide range of groups and people to participate in its reverence period. *See Snyder III*, 124 F.3d at 1351; and, *Snyder IV*, 1198 U.S. App. LEXIS 27510, at *3 & *60. The City states that it does not scrutinize the content of citizen speech during the opening ceremonies and prayers.[2] *Snyder IV*, 1998 U.S. App. LEXIS 27510, at *60. The wide range of groups invited to participate, and lack of scrutiny on part of the City are additional indicia of creation of a public forum.

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[2] Obviously that is not accurate. Murray City scrutinized the content of Snyder's prayer.

Speakers cannot be excluded from a public forum without a compelling governmental interest, and any exclusion must be narrowly drawn to meet that interest. *Cornelius*, 473 U.S. at 800; *Church on The Rock*, 84 F.3d at 1280. Here, the interests the City claims are to protect the orderly accomplishment of its agenda and to encourage civility. *See Snyder III*, 124 F.3d at 1351. These interests are not compelling. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. at 215. The promotion of civility and an orderly agenda are not compelling state interests such as to warrant censorship of First Amendment protected speech of religious nature.

III. MURRAY CITY VIOLATES THE ESTABLISHMENT CLAUSE BY FAVORING CERTAIN RELIGIOUS VIEWS OVER OTHERS.

Murray City allows only prayers which it approves to be offered in the Opening Ceremony. However, government must be neutral and must not favor one religious view over another. *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (J., Souter, concurring); *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947) (the Establishment Clause forbids state practices that "aid one religion . . . or prefer one religion over another," as well as those that "aid all religions"); *Epperson v. Arkansas*, 374 U.S. 203, 216 (1963) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion").

In *County of Allegheny v. ACLU*, this Court held

> government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, . . . and may not involve itself too deeply in such an institution's affairs.

492 U.S. 573, 590-591, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

Furthermore, this Court in *United States v. Ballard* stated that religious views that may seem incredible to some are to be afforded equal treatment to those that are less incredible; neither should be put on trial. 322 U.S. 78, 87 (1943). Snyder's religious beliefs may seem incredible to Murray City and the courts below, but they cannot be subjected to any more scrutiny than "mainstream religions". "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." *Id.* Snyder's religious beliefs as set out in his prayer have theological and constitutional basis. The effect of Murray City's subjective, amorphous guidelines is to exclude the unusual religious idea and the religious concept that make the City Council, Hall or others feel uncomfortable.

A. MURRAY CITY IMPERMISSIBLY BANS PRAYERS THE CITY DETERMINES TO CONTAIN POLITICAL THOUGHT.

Murray City claims the right to ban prayers that contain "political thought". Hall rejected Snyder's prayer because Hall found Snyder's criticism of public prayer before council meetings to be political in nature. *Snyder IV*, 1998 U.S. App. LEXIS 27510, at *8; *see also Snyder III*, 124 F.3d 1352. Differentiating between prayers that contain political thought and those that do not is unconstitutional viewpoint discrimination. *Church on The Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996).

The City has no written criteria by which to judge whether a prayer is "acceptable" and may be offered in the Opening Ceremony. This Court explained the danger of unrestrained discretion and the absence of standards in government decisions concerning free speech: "[W]ithout standards governing the exercising of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64 (1988). As a result, in the absence of previously established standards content neutrality will *not* be presumed. Therefore, where no criteria guide government conduct affecting First Amendment rights, this Court will suspect that government decisions are unconstitutionally content based. *Id.*

The *Lakewood* rule was applied in *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996). The court in *American Jewish Congress* held that the city's

rejection of applications to erect a Latin cross and a winter solstice display were unconstitutional. *Id.* at 385. The court found that the city "permitting process ha[d] no clear standards for allowing . . . displays in its parks and thus allows for arbitrary application." *Id.* at 384. Allowing one religious group to erect a religious display on public property while denying others and doing so without criteria, rules, procedures, etc. was a violation of the Establishment Clause. *Id.* at 383.

Furthermore, *American Jewish Congress* re-affirmed that protest speech is fully protected under the First Amendment. 90 F.3d at 385 (citing *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 504-506, 21 L. Ed. 2d 731 (1969); *Edwards v. So. Carolina*, 372 U.S. 229, 235, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963)). In *American Jewish Congress*, the reason behind Beverly Hills' rejection of permits to erect certain displays was because they were viewed as "protests" against a menorah erected in a city park. 90 F.3d at 385. The court stated that even if the displays were "protests" in nature, the city's rejection was based upon an impermissible basis. *Id.* Therefore, even if Snyder's prayer were a protest in nature, it should not have been rejected.

This Court expressed concerns about state review, sponsorship or censorship leading to government approved official prayers. "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is not part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government,' . . . ."

Lee v. Weisman, 505 U.S. 577 at 588 (1992) (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)). "[R]eview of prayers by government officials is one of the very practices which the First Amendment was designed to prevent. The framers knew that government involvement with one's religious practices would inevitably taint the sanctity of one's faith." *Chandler v. James*, 958 F. Supp. 1550, 1556 (M.D. Ala. 1997). The concerns articulated in the foregoing cases are now presented in a real controversy before this Court.

Rejection of Snyder's opening prayer violates the Establishment Clause in light of the lack of written standards by which the City is to judge a proposed opening prayer, and the amorphous subjective post-litigation standards articulated by Hall.

B. MURRAY CITY'S PRACTICE FAILS THE ENTANGLEMENT TEST OF *LEMON V. KURTZMAN.*

Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 93 L. Ed. 2d 948 (1973) holds that government action *vis-a-vis* religion violates the Establishment Clause unless it meets three conditions: (1) the action must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and, (3) it must not foster excessive government entanglement with religion.

The *Lemon* test has often been restated as whether the challenged government action was intended to, or has the effect of endorsing or disapproving religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592-593, 106 L. Ed. 2d

472, 109 S. Ct. 3086 (1989). Unquestionably, the actions of Murray City and Hall has the effect of disapproving certain religious beliefs. Evidence in the record indicates that specific disapproval was the intent of Murray City and Hall. Because Hall and the City were offended by the content of Snyder's prayer, the City refused to allow him to present his prayer in the same manner that other prayers are routinely presented. *See Snyder III*, 124 F.3d at 1358 (Briscoe, dissenting).

The secular purpose asserted by the City is suspect. The City claims that it sets guidelines to control the content of prayers offered during the Opening Ceremony in order to solemnize its meetings, maintain an ordered agenda, promote civility and aid in focusing participants upon the agenda. Those purposes are suspect because they were articulated to no one other than Snyder and only in response to his request to offer a prayer. The alleged purpose of promoting civility is suspect because only the prayer portion of the City Council meetings is monitored to promote civility. *Id.*

The "entanglement" test of *Lemon* is critical. In the case at bar, entanglement is excessive, substantial and obvious. Murray City through Hall enforces purely subjective criteria to determine whether a prayer may be offered before a Murray City Council meeting. The application of these criteria by the City is "excessive entanglement." The City Council meets approximately three (3)

times per month. Every prayer offered must be screened by Hall.[3]

The excessive and offending entanglement in *Lemon* was government monitoring required to ensure that teachers paid with public funds did not teach religion. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected . . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Lemon*, 403 U.S. at 620. As a result, Murray City's attempt to control the content of prayers to be offered by private citizens before City Council meetings violates the Establishment Clause.

IV. CONCLUSION.

Having created a forum for religious expression and having allowed, even encouraged private citizens to offer prayers, the City cannot censor religious ideas that it might find odd, unusual or "unacceptable." Government is not permitted to engage in minute review and approval of private religious ideas as the City has done. To do so will result in government composing official state prayers and in government determining what is acceptable public prayer. To do so violates the Establishment Clause. This

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[3] If every prayer is not reviewed and screened, the City's claim of a secular purpose is pretense. The City must apply its criteria equally and consistently to all in order to effectuate its claimed purposes of civility, solemnization and focus on agenda.

Court should review the decision in this action by the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TOM SNYDER, Plaintiff-Appellant, v. MURRAY CITY CORPORATION, a municipal corporation; H. CRAIG HALL, City Attorney for Murray City Corporation, Defendants-Appellees. UNITED STATES OF AMERICA, Intervenor.[1]	)	No. 96-4087 (Filed Oct. 27, 1998)

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 94-CV-667)

Brian M. Barnard (Andrea Garland of the Utah Legal Clinic, with him on the briefs), Cooperating Attorneys for

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[1] The government intervened in this case in the district court solely for the purpose of defending the constitutionality of the Religious Freedom Restoration Act of 1993. The government did not participate in the initial appeal of this case and did not participate in this en banc rehearing. Thus, although the government remains named in the caption of this case, it is not a party to the appeal.

Utah Civil Rights & Liberties Foundation, Inc., Salt Lake City, Utah, for Plaintiff-Appellant.

Allan L. Larson (Richard A. Van Wagoner, with him on the brief) of Snow, Christensen & Martineau, Salt Lake City, Utah, for Defendants-Appellees.

Before **SEYMOUR**, Chief Judge, **HOLLOWAY**, Senior Circuit Judge, **PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO**, and **MURPHY**, Circuit Judges.

EBEL, Circuit Judge.

This court has agreed to rehear this case en banc[2] to consider whether the Establishment Clause of the First Amendment prevents a city council from denying a request from a private citizen to give a prayer at the opening of the council's meeting when the denial is made on the basis of the content of the proposed prayer. The Supreme Court of the United States has previously held in *Marsh v. Chambers*, 463 U.S. 783 (1983), that the United States Constitution is not violated if a legislative or other

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[2] The original panel in this case voted to affirm in part and reverse in part the district court's order. *See Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997). This court granted the appellant's petition for rehearing en banc limited to the Establishment Clause issues presented in the case. We now vacate Part I.B. of the panel's opinion. We did not grant rehearing as to the other portions of the panel decision, and consequently, the remainder of the panel opinion remains in effect.

deliberative body chooses to speak prayerfully when it opens its meetings. Applying *Marsh*, we now hold that no violation of the Establishment Clause arises when a city chooses who may offer the invocational prayer to open a city council meeting.

Background

The background of this case is reported in the district court and original panel opinions, *see Snyder v. Murray City Corp.* 902 F. Supp. 1444 (D. Utah 1995) [*"Snyder I"*] and *Snyder v. Murray City Corp.*, 902 F. Supp. 1455 (D. Utah 1995) [*"Snyder II"*], *aff'd in part & rev'd in part, Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997) [*"Snyder III"*]. We provide only those details that are germane to the Establishment Clause issue that we deal with here.

In 1993, the Utah Supreme Court held that the religion clauses of Utah's state constitution do not prohibit a city council from opening its meetings with a prayer. *See Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993). In the wake of that decision, the municipal council of Murray City resumed a practice it had maintained since 1982 – but suspended during the pendency of the appeal in *Separationists* – of opening each of its meetings with a prayer. Those prayers had been offered by members of the religious communities in and around Murray City, including various members of Judeo-Christian congregations, Zen Buddhists, and Native Americans. Each of those offering prayers during Murray City's council meetings did so at the initial request of the City Council, usually in response to a form letter the council

circulated to local religious communities. Prior to the events at issue in this case, the city had never received an unsolicited request from a private individual to give a prayer at a council meeting. In light of this historical practice, Murray City had no written policy on its council prayers, and it had no formal guidelines for the content of its council prayers.

The decision in *Separationists*, and the ensuing resumption of legislative prayers by city councils throughout Utah, prompted Tom Snyder, plaintiff-appellant here, to draft a prayer that calls on public officials to cease the practice of using religion in public affairs.[3]

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[3] The text of Snyder's proposed prayer is as follows:

OPENING PRAYER

OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman's form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats' decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings;

Although Snyder's putative prayer is unusual and iconoclastic, because this case was decided on summary judgment we will assume without deciding that it is an invocational prayer.[4] *See Engel v. Vitale*, 370 U.S. 421, 424

> We ask that you grant Utah's leaders and politicians enough courage and discernment to understand that religion is a private matter between every individual and his or her deity; we beseech thee to educate government leaders that religious beliefs should not be broadcast and revealed for the purpose of impressing others; we pray that you strike down those that mis-use your name and those that cheapen the institution of prayer by using it for their own selfish political gains;
>
> We ask that the people of the state of Utah will some day learn the wisdom of the separation of church and state; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our gods;
>
> We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the state of Utah by the actions of misguided, weak and stupid politicians, who abuse power in their own self-righteousness;
>
> All of this we ask in thy name and in the name of thy son (if in fact you had a son that visited Earth) for the eternal betterment of all of us who populate the great state of Utah.
>
> Amen.

[4] Snyder's supplications draw on religious tenets held by many. *See Matthew* 6:5; *Book of Mormon*, 3 Nephi 13:6. Although there is admittedly some contradictory evidence in the record, Snyder has presented sufficient evidence to create a genuine

(1962) (noting that a "solemn avowal of divine faith and supplication for the blessings of the Almighty" is a "prayer" with an explicitly religious character); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. Unit A Aug. 1981) ("Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object."). Although Snyder's supposed prayer can perhaps as easily be characterized as political harangue, the political aspect of a religious supplication does not necessarily invalidate the invocation's prayerful character. *See Karen B.*, 653 F.2d at 901 ("That [a prayer] may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise."). Nevertheless, the Establishment Clause speaks only to the religious aspect of Snyder's prayer, which we presume for purposes of this appeal, and as a result, we are not called in this case to evaluate the prayer's political overtones. By assuming the religious content of Snyder's prayer, we expressly reserve for another day the very difficult issue of attempting to discern the line between prayer and secular speech masquerading as prayer.

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dispute of fact as to the sincerity of his religious belief that prayer should be a private matter and should not be used to self-aggrandize the prayer-giver.

Nevertheless, if Snyder's invocation is not a "prayer," our ultimate conclusion that Murray City did not violate the Establishment Clause would remain the same. If Snyder's speech is a non-prayer, then for the reasons we discuss below in Part III, there would be no "impermissible motive" in preventing Snyder from reciting a non-prayer during a time permissibly reserved for legislative prayer. Thus, there would be no Establishment Clause violation. *See* Part III, *infra*.

Snyder first presented this prayer, and his request to recite it, to the city council in Salt Lake City, prompting media coverage of the proposed prayer including publication of extensive excerpts. *See, e.g.*, Jon Ure, *S.L. Man Wants to Ask Mother in Heaven to End Public Prayer*, Salt Lake Trib., Jan. 19, 1994, at B1. Rather than allowing Snyder to recite the prayer, officials in Salt Lake City decided to discontinue that city's practice of opening their city council meetings with a prayer.

Snyder next contacted officials in Murray City with a letter on March 23, 1994, expressing his interest in presenting a prayer at one of the council's upcoming meetings and asking for information on guidelines for such prayers and how a person is selected to give such prayers. This letter gave no hint as to the text of Snyder's proposed prayer. When Snyder received no response to his first letter, he sent a second letter on May 9, 1994, again expressing interest in giving a prayer at a city council meeting. This second letter again included no mention of the text of his proposed prayer.

On June 1, 1994, City Attorney H. Craig Hall responded to Snyder's letters by explaining that the city council had established an explicit policy that "all council meetings will start with prayer," but the council had not established "formal policies regarding the nature and/or content of this reverence portion of their agenda." Hall's letter continued:

> The purpose of the "prayer" is to allow individuals that opportunity to express thoughts, leave blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies.

> Comments on present city practices or policies may be made at city council meetings by one of two methods; either by requesting to be placed on the agenda, or, taking up to three minutes during the "citizen comment" portion of the meeting. The later [sic] method requires no prior arrangements to be made.[5]

Nowhere in his June 1 letter did Hall respond to Snyder's particular request for permission to give a prayer at a city council meeting.

On June 9, 1994, Snyder sent a third letter to Murray City, again repeating his request for permission to give a prayer at a city council meeting and this time including a copy of the text of his proposed prayer.

Three weeks later, Hall responded to Snyder's third letter, this time explicitly denying permission for Snyder to give a prayer at a city council meeting:

> The text of the proposed prayer is unacceptable. It does not follow the guidelines set forth in my letter dated June 1, 1994. Until your proposed prayer satisfies these guidelines, an invitation to participate in our opening ceremonies will not be forthcoming.

Snyder received Hall's denial letter on July 1, 1994, and filed the original complaint in this case the same day.

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[5] The text of this letter, with its references to attacks on city policies, suggests that City Attorney Hall already was aware of the general tenor of Snyder's proposed prayer even though Snyder had not yet included a copy of it in his letters to Murray City. At a later deposition in this case, Hall conceded that he was influenced by media coverage of Snyder's dealings with the Salt Lake City council when he wrote the June 1, 1994, letter.

Snyder's subsequently amended complaint sought compensatory and punitive damages, as well as injunctive and declaratory relief, on the basis of Murray City's alleged violations of Snyder's First Amendment and procedural due process rights under the United States Constitution and the Utah Constitution, as well as his rights under the Religious Freedom Restoration Act of 1993. Following discovery and cross-motions for summary judgment, the district court ruled against all of Snyder's claims. *See Snyder I*, 902 F. Supp. at 1455 (granting summary judgment to Murray City); *Snyder II*, 902 F. Supp. at 1458 (denying Snyder's motion for new trial). On appeal, a divided panel of this court affirmed the district court's resolution of Snyder's federal claims but instructed the district court to dismiss, without prejudice, Snyder's state-law claims for want of adequate supplemental jurisdiction. *See Snyder III*, 124 F.3d at 1353-55. This court subsequently agreed to rehear only Snyder's federal Establishment Clause claim en banc.[6]

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[6] The order for rehearing en banc initially specified two questions for the parties to address. This court, however, subsequently modified that order to delete the specific questions presented and "clarify that rehearing en banc is granted on the Establishment Clause issues in this case."

Discussion[7]

The very first command of our Bill of Rights, as it applies to the states through the Fourteenth Amendment, is that state and local governments "shall make no law respecting an establishment of religion." U.S. Const., amend. I, cl. 1. At its core, the Establishment Clause enshrines the principle that government may not act in ways that "aid one religion, aid all religions, or prefer one religion over another." *See Lee v. Weisman*, 505 U.S. 577, 600 (1992) (Blackmun, J., concurring). As Justice Black declared for the Supreme Court more than fifty years ago, "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947). This core understanding of our notion of religious liberty stretches back to the very genesis of the First Amendment. *See Reynolds v. United States*, 98 U.S. (7 Otto.) 145, 164 (1878) (discussing the history of the Establishment Clause and quoting Jefferson's letter to the Danbury Baptist Association on the purpose of the clause to "build[ ] a wall of separation between church and State").

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[7] In light of the First Amendment issue raised in this appeal and our consequential " 'obligation to make an independent examination of the whole record,' " we review the district court's summary judgment decision de novo. *See Lytle v. City of Haysville, Kansas*, 138 F.3d 857, 862 (10th Cir. 1998) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)).

Although there are many kinds of Establishment Clause claims, the prayer cases typically arise in a procedural posture that pits an audience member of a particular faith, often a minority religious view, against a government-sanctioned speaker who has recited a prayer, often expressing a majoritarian religious view, during a government-created prayer opportunity. *See, e.g., Lee*, 505 U.S. at 581 (involving a student's challenge to a public school graduation prayer prepared by a local rabbi in compliance with school district guidelines developed by the National Conference of Christians and Jews); *Chaudhuri v. Tennessee*, 130 F.3d 232, 233-34 (6th Cir. 1997) (involving a Hindu professor's challenge to a public university's practice of beginning university events and faculty meetings with prayers), *cert. denied*, 118 S. Ct. 1308 (1998); *see also Bauchman v. West High Sch.*, 132 F.3d 542, 546 (10th Cir. 1997) (involving a Jewish student's challenge to a Mormon music teacher's various practices and selection of allegedly religious music for a high school choir in Salt Lake City), *cert. denied*, 118 S. Ct. 2370 (1998).

The difficulty of the establishment claim in this case flows partly from its inversion of the usual posture. Here, the plaintiff is the putative government-sanctioned speaker, and he alleges that in preventing him from reciting his prayer against government prayers, the government has established a religion. Despite its unusual posture, the essence of Snyder's contention is straightforward: Snyder claims that in branding his particular prayer "unacceptable" and preventing him from offering it as part of the official "reverence period" of the

municipal council meeting, Murray City has impermissibly preferred one religion over another. We must decide if that is so.

I. Sui generis status of legislative prayers

Prior to 1983, the lower courts had reached a consensus, but without any consistent rationale, on the conundrum of whether overtly religious prayers by local and state legislative bodies in opening their legislative sessions constituted the kind of religious activity banned by the Establishment Clause. With varying reasoning, the lower courts agreed that such legislative prayers did not fall within the prohibition against a "law respecting an establishment of religion." *See Bogen v. Doty*, 598 F.2d 1110, 1113-14 (8th Cir. 1979) (applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)), in upholding a county board's practice of invocational prayers because they had a "clearly secular purpose," but warning that the county's selection procedures for who should give such prayers were dangerously close to the "quagmire" of "excessive entanglement" and that the board would be in a "difficult position" if it rejected a volunteer because of his or her religious persuasion); *Colo v. Treasurer & Receiver General*, 392 N.E.2d 1195, 1199-1200 (Mass. 1979) (upholding the state's practice of paying legislative chaplains in large part because of the practice's long history and tradition and because it did not present substantial "divisive political potential"); *Marsa v. Wernik*, 430 A.2d 888, 895-96 (N.J.) (upholding invocational prayers at a borough council meeting because the religious dimension of the prayers did not predominate over secular goals,

nor was the primary effect of the prayer to promote or inhibit religion), *cert. denied*, 454 U.S. 958 (1981); *Lincoln v. Page*, 241 A.2d 799, 800-01 (N.H. 1968) (upholding a town's practice of invocational prayers at each annual town meeting because of a de minimis religious effect, historic use, and similarity to religious references on coins, currency, public buildings and plaques).

In 1983, however, the Supreme Court swept away the various approaches with its pathmarking decision in *Marsh v. Chambers*, 463 U.S. 783 (1983). Noting that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," the Court held that "[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer [opening a legislative session]." *Marsh*, 463 U.S. at 786, 791. In the course of reaching this holding, the Court surveyed the historical record of the views of the framers of the Constitution as well as the practices of the early Congresses and the infant state legislatures. The Court concluded, "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788.

Although the Court relied solely – and to the exclusion of its traditional establishment tests – on a historical analysis to justify the practice of legislative prayers in

Marsh,[8] since that decision the Court has repeatedly avoided applying Marsh's mode of historical analysis. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 603 (1989) (rejecting the dissenting argument in *Allegheny County* that the *Marsh* historical analysis controlled the constitutionality of traditional crèche displays at Christmas: "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.") Instead, the evolution of Establishment Clause jurisprudence indicates that the constitutionality of legislative prayers is a *sui generis* legal question. As Justice Brennan noted in his dissent in *Marsh*, the kind of legislative prayers at issue in *Marsh* simply would not have survived the traditional Establishment Clause tests that the Court had relied on prior to *Marsh* and has continued to rely on in different contexts

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[8] The historical analysis that formed the basis of Chief Justice Burger's majority opinion in *Marsh* has tempted many litigants and some courts to argue that the Supreme Court in *Marsh* created a whole new mode of analysis for Establishment Clause claims generally. *See, e.g., Stein v. Plainwell Community Schs.*, 822 F.2d 1406, 1409-10 (6th Cir. 1987) (holding that *Marsh*'s reliance on historical acceptance controlled the court's holding that nonsectarian, nondenominational school graduation prayers are constitutional). *But see Lee*, 505 U.S. at 589, 596-97 (rejecting the view in *Stein* that school graduation prayers could be justified by their historical acceptance and stressing again the limited nature of its ruling in *Marsh* permitting invocational legislative prayers).

since *Marsh*. *See Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). For this reason, the mainline body of Establishment Clause case law provides little guidance for our decision in this case. Our decision, instead, depends on our interpretation of the holding in *Marsh*.

In describing its conclusion that legislative prayers do not violate the First Amendment, the *Marsh* Court approached the question first and foremost as a facial issue, separate from the particular nuances of the Nebraska practice there under review. The Court made clear that it was considering legislative prayers as a kind of religious genre, and it was this particular genre that was unvitiated by the Establishment Clause:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Id. at 792. This religious genre known as "legislative prayer" includes the traditional kind of invocational legislative prayers with which the Court was familiar, as well as similarly traditional governmental invocations such as the cry, "God save the United States and this Honorable Court," intoned by the Court's bailiff at the

beginning of its own sessions.[9] *See id.* at 786. As Justice O'Connor later explained, these kinds of "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). In *Lynch*, the majority observed that the Establishment Clause cannot mechanistically be applied to draw unwavering, universal lines for all of the varying contexts of public life. Rather, the clause erects a " 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' " *Id.* at 679 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)). The Court noted that "[i]t would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers [than legislative invocational prayer]." *Id.* at 674.

We are obliged, therefore, to read *Marsh* as establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call "legislative prayer" does not violate the Establishment Clause. Furthermore, as a consequence of the fact that this genre of government religious activity cannot exist without the government actually selecting someone to offer such prayers, the decision in *Marsh* also must be read as establishing the constitutional principle that a legislative body

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[9] This judicial invocational prayer also was recited prior to the oral arguments in this very case.

does not violate the Establishment Clause when it chooses a particular person to give its invocational prayers. Similarly, there can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a certain person to give its prayers. The act of choosing one person necessarily is an act of excluding others, and as a result, if *Marsh* allows a legislative body to select a speaker for its invocational prayers, then it also allows the legislative body to exclude other speakers.

II. Constitutional limits on legislative prayers

Snyder argues that even if *Marsh* allows legislative prayers, that case imposes some limits on a legislative body's discretion to appoint or to exclude the persons who will recite its prayers. Snyder points out that when the Court turned to the particular nuances of the Nebraska practice in *Marsh*, the Court gave only conditional approval to the legislative chaplain system there. *See Marsh*, 463 U.S. at 793-95. Snyder argues that in light of those conditions in *Marsh*, Murray City may not discriminate against his request to give an opening prayer based on the content of his proposed prayer.

Although we agree with Snyder that *Marsh* implicitly acknowledges some constitutional limits on the scope and selection of legislative prayers, those limits are not the ones Snyder would have us adopt. The Establishment Clause and *Marsh* simply do not require that a legislative body ensure a kind of equal public access to a legislative body's program of invocational prayers. Instead, the constitutional restraints on legislative prayers flow directly

from the scope of the religious genre blessed in *Marsh*. What matters under *Marsh* is whether the prayer to be offered fits within the genre of legislative invocational prayer that "has become part of the fabric of our society" and constitutes a "tolerable acknowledgment of beliefs widely held among the people." *See id.* at 792.

The point at which an invocational legislative prayer falls outside the traditions of the genre and becomes intolerable occurs when "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[10] *See id.* at 794-95; *see also Coles v. Cleveland Bd. of Educ.*, 950 F. Supp. 1337, 1347

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[10] Of course, all prayers "advance" a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power. Nevertheless, the context of the decision in *Marsh* – in which the Court considered the constitutionality of a Presbyterian minister's "Judeo Christian," "nonsectarian" invocations for the Nebraska Legislature – underscores the conclusion that the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause.

Rather, what is prohibited by the clause is a more aggressive form of advancement, i.e., proselytization. *See Marsh*, 463 U.S. at 793 n.14, 794-95. By using the term "proselytize," the Court indicated that the real danger in this area is effort by the government to convert citizens to particular sectarian views. *See Websters Third New International Dictionary (Unabridged)* 1826 (1986) (defining "proselytize" as "to convert from one religion, belief, opinion, or party to another"). As the Court reiterated in *Lee*, "[I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 591-92.

(N.D. Ohio 1996) (relying on *Marsh* to uphold a school board's practice of invocational prayer because "the record does not support a finding that the board was using prayer as an attempt to convert audience members or to promote any particular belief"); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192 (C.D. Cal. 1998) (denying a request for a preliminary injunction against a school board's practice of invocational prayer in light of *Marsh*). As *Marsh* indicated, the danger is not just an effort to proselytize or disparage an entire religion, but also efforts to proselytize or disparage the particular tenets or beliefs of individual faiths. *See Marsh*, 463 U.S. at 794-95. The Court explained six years after *Marsh* that "not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." *See Allegheny County*, 492 U.S. at 603 (quoting *Marsh*, 463 U.S. at 791). Thus, the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine. When a legislative invocation strays across this line of proselytization or disparagement, the Establishment Clause condemns it.

As a second constitutional restriction on legislative prayer, the Court in *Marsh* also warned that the selection of the person who is to recite the legislative body's invocational prayer might itself violate the Establishment Clause if the selection "stemmed from an impermissible motive." *See Marsh*, 463 U.S. at 793. The Court implicitly

indicated that the particular motive that is "impermissible" in this context is a motive in selecting the prayer-giver either to "proselytize" a particular faith or to "disparage" another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body. *See id.* at 793-95.

It is clear under *Marsh* that there is no "impermissible motive" when a legislative body or its agent chooses to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer. The genre approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose. That genre, although often taking the form of invocations that reflect a Judeo-Christian ethic, typically involves nonsectarian requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body. When a legislative body prevents its agents from reciting a prayer that falls outside this genre, the legislators are merely enforcing the principle in *Marsh* that a legislative prayer is constitutional if it is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *See Marsh*, 463 U.S. at 792.[11]

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[11] The traditional tone for legislative prayers can be found as early as the constitutional convention in 1787, when Benjamin Franklin proposed that the convention begin each morning with "prayers imploring the assistance of Heaven, and its blessings on our deliberations. . . . " 1 Max Farrand, *Records of the Federal Convention of 1787* 452 (1911), *quoted in Marsh*, 463 U.S. at 787 n.6.

The same tone also is evident in the prayers of Nebraska's legislative chaplain that the Supreme Court found unobjection-

III. The constitutionality of Murray City's "Reverence Period"

Turning now to the specifics of this case, Snyder's amended complaint sought a declaratory judgment that Murray City's "conduct is in violation of . . . the establishment protection . . . of the United States Constitution." We do not perceive this request as seeking a declaration that Murray City's practice of beginning its council meetings with a prayer is unconstitutional as a whole. Rather, Snyder's request merely seeks a declaration that Murray City's particular denial of his individual request to participate in the city's "reverence period" at the opening of its meeting is unconstitutional.

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able in *Marsh*. See Joint Appendix at 92-108, *Marsh v. Cambers*, 463 U.S. 783 (1983) (No. 82-23). For example, in 1975, the Rev. Robert E. Palmer offered the following prayer: "For ties that continue to bind us together, even when the going is rough, for common purposes we continue to recognize as larger than we are, even when the business at hand taxes our patience and our constituents; for the privilege of sharing in the inspirations – as well as the frustrations – of events which make headlines . . . we now ask Your help, O Lord our God." *Id.* at 93-94. Similarly, in 1979 during the Easter season, the chaplain offered the following prayer: "Today as we are about to celebrate the great Holy Days of Christians and Jews, Holy Week and Passover, let us be reminded again through the faith and beliefs of our religions of the principles and directives which should guide us. . . . May these Holy Days, then, enable us to act as true followers of the beliefs which we have and may it find expression in every act and law that is passed." *Id.* at 108.

Finally, a prayer offered in 1975 implored, "O Lord, our God, if ever we needed Thy wisdom and Thy guidance, it is now – as our Legislature begins a new session, standing upon the threshold of a new year, fraught with so many dangerous opportunities. *Id.* at 92.

Snyder's claim must fail as a matter of law because his proposed prayer falls well outside the genre of legislative prayers that the Supreme Court approved in *Marsh* and the record is devoid of evidence indicating an intent to promote or disparage any religion. Not only does Snyder's prayer explicitly attack the genre itself, it also disparages those who believe that legislative prayer is appropriate. *See* Opening Prayer, *supra* note 3 (denouncing politicians who believe in the use of legislative prayer as "self-righteous," "hypocritical," "selfish," "misguided, weak and stupid," and calling the belief in the use of legislative prayer "blasphemous," "evil," and "cheapen[ing]"). Most importantly, Snyder's prayer aggressively proselytizes for his particular religious views and strongly disparages other religious views. *See id.* (asking for divine assistance to "guide" civic leaders to "the wisdom of separating church and state" and to "never again perform demeaning religious ceremonies as part of official government functions").[12] Snyder's prayer clearly draws on the tenets of his belief – which is an

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[12] In fact, virtually every supplication in Snyder's "Opening Prayer" variously calls on the citizens and leaders of Utah to convert from their adherence to public governmental prayer. In addition to the second paragraph quoted above, the third paragraph asks for divine assistance to "lead" Utah's politicians away from the practice of governmental prayer; the fourth paragraph asks that Utah's politicians be "educate[d]" and come to "understand" that prayer should be private and not used for the purpose of impressing others; the fifth paragraph asks that divine power "teach" the people of Utah that government should not participate in religion, and the sixth paragraph asks that divine power "deliver us from the evil of forced religious worship." *See* Opening Prayer, *supra* note 3.

aspect of many different religious faiths – that prayer should only be conducted in private. Because Snyder's prayer seeks to convert his audience to his belief in the sacrilegious nature of governmental prayer, his prayer is itself proselytizing. As a result, Murray City was well within its rights under *Marsh* to deny permission for Snyder to recite his proposed prayer. A deliberative body has a right to take steps to avoid the kind of government prayer that would run afoul of *Marsh* and the Establishment Clause.

Having concluded that Murray City did not violate the Establishment Clause in refusing Snyder's prayer, we next address the point raised by the dissent to the original panel decision in this case, to the effect that there is sufficient evidence in the record below to raise a dispute of fact as to whether Murray City relied on an impermissible motive in its denial of Snyder's prayer. *See Snyder III*, 124 F.3d at 1357-58 (Briscoe, J., dissenting). The record includes circumstantial evidence to suggest that City Attorney Hall's letter of June 1, 1994, in which he outlined Murray City's standards for legislative prayers, was drafted specifically to exclude the kind of prayer that Snyder had proposed. *See id.* (pointing out that City Attorney Hall was aware of and influenced by newspaper accounts of Snyder's dealings with the city council in Salt Lake City). However, this evidence only establishes that Hall was concerned with the political nature of the proposed prayer and with the fact that it was not consistent with the genre of legislative invocational prayer for which the opening portion of the legislation session had been reserved.

This evidence only tends to establish that Murray City acted with a "permissible" motive in excluding Snyder's proposed prayer. Snyder's proselytizing and disparaging prayer falls well outside the scope of invocational legislative prayers found to be constitutional in *Marsh*, and thus there was nothing improper about excluding it from the time properly set aside for legislative prayer. It was therefore permissible to exclude Snyder's prayer from the city's 'reverence period.' In drafting guidelines for council prayers that excluded Snyder's prayer, the record demonstrates that Hall was attempting to exclude the prayer because of its proselytizing and disparaging nature.

Finally, Snyder attempts to incorporate the Free Speech Clause of the First Amendment into his argument in this appeal. Because these contentions fall outside the limitation of our order for rehearing – confined as it was to the Establishment Clause issues in this case – we will not address them.

Conclusion

Under the Establishment Clause of the First Amendment, the municipal council of Murray City has the power to open its meetings with the kind of legislative prayer that our nation over the course of more than 200 years has come to see as "tolerable." *See Marsh*, 463 U.S. at 792. Furthermore, in the exercise of that power, Murray City has the discretion to prevent a proposed prayer that would be intolerable to that tradition. Snyder's prayer both proselytizes for his own particular brand of religion and disparages other contrary religious views. As such, it

falls outside the genre of invocational legislative prayer authorized by *Marsh*, and Murray City did not violate the Establishment Clause in rejecting it. Thus, the district court correctly granted summary judgment against Snyder's Establishment Clause claim.

We AFFIRM the district court's dismissal of plaintiff's establishment claim. The remainder of the original panel opinion remains in effect as originally issued in *Snyder III*, 124 F.3d at 1352-53, 1354-55. We REMAND for further proceedings consistent with the disposition in *Snyder III*. *See id.* at 1355.

LUCERO, Circuit Judge, concurring in the judgment.

I concur in the judgment that Mr. Snyder is not entitled to the relief he seeks on his Establishment Clause claim.[1] I arrive at this conclusion using a different analysis from that employed by the majority. I write separately to state my disagreement with what I believe to be

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[1] Like the majority, I do not read Snyder's amended complaint as directed to Murray City's practice of beginning its council meetings with prayer. With the majority, I understand that Snyder is only challenging the city's denial of his individual request to offer his prayer at the pre-meeting "reverence period." Were I to read his amended complaint more broadly, I would be obliged to endorse a result at odds with that reached by the majority.

the majority's impermissible extension of *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh* holds squarely that "legislative prayer" delivered by an established chaplaincy system is not per se unconstitutional. But the *Marsh* Court did not consider the constitutionality of the prayer format utilized by Murray City, wherein prayers are routinely offered, at the City Council's invitation, by members of the public acting as representatives of discrete religious groups. Contrary to the view of the majority, I believe the city's choice of format proscribes regulation of the content of the prayers offered.

However, contrary to the dissent, I do not believe that the city's elimination of its content regulations can salvage the constitutionality of its chosen prayer format. Although I agree with the dissent that Murray City's practice of excluding certain prayers for their content violates the Establishment Clause, Snyder is not entitled to give his prayer at a reverence period that is itself a violation of the Establishment Clause.[2] The remedy he wants is no remedy at all.

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[2] Given the summary judgment posture of this case, I am obliged to regard Snyder's proposed contribution to the reverence period as a genuine expression of his sincerely held religious beliefs. *See Mosier v. Maynard*, 937 F.2d 1521, 1523-25 (10th Cir. 1991); Appellant's App. at 259 (Dep. of Tom Snyder) ("Q: And does this opening prayer represent sincerely held religious beliefs on your part? . . . A: Yes, it does."). As a result, I accept, for purposes of analysis, the majority's assumption that Snyder's language comprises a prayer.

I

As plainly evidenced by the case before us, government officials operating an open prayer format are inevitably drawn into regulating the content of the prayers offered.[3] The majority believes such regulation to be sanctioned by *Marsh*. I respectfully disagree. Purporting to interpret and apply *Marsh* to this case, the majority avers that a governmental body can constitutionally bar a particular legislative prayer when " 'the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.' " Maj. Op. at 18-19 (quoting *Marsh*, 463 U.S. at 794-95). I believe it misguided, however, to read this single passage from *Marsh* as standing for the far-reaching proposition that a governmental body can, in all circumstances, allow certain legislative prayers while censoring and barring others because they "proselytize" or "disparage" another faith or religious belief. Read properly, in the factual and historical context that anchors the case, *Marsh* does not vest a governmental body with such powers.

Marsh states that "[t]he question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause." 463 U.S. at 784; *see also id.* at 786 ("We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a State-employed clergyman.") (citing 459 U.S.

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[3] Asked to confirm that "Mr. Snyder's proposed prayer was rejected because of the content and for no other reason," Mr. H. Craig Hall, the Murray City Attorney, responded: "I think that is an accurate statement." Appellee's App. at 88-89.

966 (Nov. 1, 1982)). Although *Marsh* may perhaps be read to extend to circumstances in which chaplains are *not* paid and in which there is no *single* officiating clergyman, *see id.* at 794 n.18, the opinion's historical treatment of legislative prayer shows that *Marsh* involves, and should be limited to, *established chaplaincies* – chaplaincies that are so structured that they become an arm or an office of the legislature.[4]

Congressional chaplains, like the chaplain at issue in *Marsh*, are not members of the public invited on some representative or wholly open basis to give legislative prayers. They are officers of the state, who hold official government positions. Referring to the origins of legislative prayer, the *Marsh* Court noted that:

> The tradition [of legislative prayer] in many of the colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with a prayer.

Id. at 787-88 (footnotes and citations omitted). *Marsh* underscores the fact that congressional chaplains are official governmental functionaries when, in discussing the history of the position, it states:

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[4] Of course, whether or not a chaplaincy is a salaried position may be an indicium of whether its occupant is an official government agent.

> [O]n April 7, 1789, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain; the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law.

Id. at 788 (footnote and citations omitted). Noting that Nebraska's chaplaincy practice "is consistent with the manner in which the First Congress viewed its chaplains," *Marsh* further states that "[r]eports contemporaneous with the elections [of congressional chaplains] reported only the chaplains' names and not their religions or church affiliations." *Marsh*, 463 U.S. at 794 n.16. This again serves to make the point that the nature of the chaplaincy with which *Marsh* deals does not involve people acting as members, leaders, or spokespersons of particular religions. Rather, they are people who are first and foremost acting as officers of the various legislative bodies they serve.

It is this fact that explains *Marsh*'s cautionary language – on which the majority ultimately rests – that legislative prayer not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. Plainly, established legislative chaplaincies may not proselytize, or disparage a particular belief, consistent with the dictates of the Establishment Clause. Such chaplains speak for the legislature, and may not therefore champion particular religious beliefs while disparaging others. But, by the same token, the government has the authority to tell its representatives what

they can and cannot do in their official capacities. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the State is the speaker, it may make content-based choices."). Prohibiting official chaplaincies from proselytizing on behalf of one religion, or disparaging another, is not only within the powers of the government, but serves a crucial Establishment Clause purpose because it ensures that the government does not, through its officers, espouse one particular religious view to the detriment of others.

However, when the person giving a legislative prayer does *not* speak from an established chaplaincy position, then *Marsh*, standing for the proposition that the government *may* censor prayers of proselytization, is inapplicable.[5] What is applicable is the Supreme Court's

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[5] Admittedly, the line between an established chaplaincy and an open prayer system is not a bright one. But, as the Supreme Court has frequently noted, that is a feature inevitably common to much Establishment Clause jurisprudence. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) ("The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. . . . The line between permissible relationships and those barred by the Clause can be no more straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' ") (quoting *Lemon v. Kurtzman*, 403 U.S. 668, 614 (1971)). But there can be no doubt that the facts of this case place it squarely outside *Marsh*. Murray City's practice sought "to invite a diverse community" to speak at prayer sessions, Appellee's App. at 10, and these invitations were sent to "associations" of a "religious nature," *id.* at 71-72. There is no suggestion in the record that such a diverse community of

traditional Establishment Clause jurisprudence, specifically its prohibition on "excessive entanglement." *See Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The process of policing the prayers offered in an attempt to exclude proselytization or disparagement will inevitably "call[ ] for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970); *see also Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (public university that offers its facilities for student group meetings "risk[s] greater 'entanglement' " by attempting to enforce exclusion of groups practicing religious worship and speech, in part because of "continuing need to monitor group meetings to ensure compliance with the rule"); *Lemon*, 403 U.S. at 620 (statute's requirement that government examine school records to determine how much of total school expenditure is attributable to secular education and how much to religious activity, "is fraught with the sort of entanglement that the Constitution forbids"). Prayers will either have to be submitted for approval in advance, as was the case for Mr. Snyder, *see* Appellee's App. at 199 ("Until your proposed prayer satisfies these guidelines, an invitation to participate in our opening ceremonies will not be forthcoming"), then assessed by some government body using pre-established government criteria that purport to distinguish proselytizing from non-proselytizing behavior, or else assessed on the

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religious bodies, offering prayers before council meetings, spoke as government functionaries. Indeed, the City Attorney confirms that, in many cases, he has no idea what the invited parties will say – precisely because he does not know what religious beliefs such parties even hold. *See id.* at 183.

spot – the gavel ready -- for such content before the amen is spoken.[6] And the process will have to be repeated time after time.

I cannot accept that the Constitution allows the government to subject private citizens – as opposed to official chaplaincies – to such liturgical supervision. "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.' " *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).[7]

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[6] A final alternative – that the government only extend invitations to those religious groups that it adjudges likely to abide by an implicit bar against proselytizing, a practice which may have occurred here, *see* Appellee's App. at 155 – is obviously no less entangling. Such practice also raises the specter of religious groups molding public statements of their creeds in ways designed to elicit governmental approval, thus offending one of the core historical purposes of the Establishment Clause. *See infra* note 13.

[7] The foregoing analysis accepts the majority's implicit assumption that Murray City rejected Snyder's prayer because it proselytized and disparaged other religions. Like the dissent, however, I believe the record raises serious questions as to whether this was in fact the City's grounds for refusing the prayer.

Mr. Hall, the City Attorney who made the decision to reject Snyder's prayer, claims that he did so pursuant to a long-standing, albeit implicit and never before invoked, practice of refusing prayers or invocations that expressed political views, or attacked or mocked city policies and practices. *See* Appellee's App. at 195. There is scant suggestion in the record that Hall refused the prayer because it disparaged other faiths. Rather, Hall's claimed focus was on what he perceived as

II

However, the dissent's suggested alternative to the majority's proposal that the City Council regulate the content of public prayer offered during a pre-meeting reverence period – namely that the City permit all prayers, Snyder's included – is also unconstitutional. As Snyder's "prayer" starkly demonstrates, without content-based restrictions, the "reverence period" established by Murray City will be used to disparage the religious beliefs of others. The resulting juxtaposition of aggressive proselytization with the exercise of legislative power violates the Establishment Clause.

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disparagement of the City Council and its practice of allowing pre-meeting prayers.

Nonetheless, Snyder still validates his Establishment Clause claims. Even if one assumes Hall did not develop the stated criteria as a pretext for religious viewpoint discrimination (which assumption I make only for the purposes of the present discussion), the mere application of the criteria violates the Establishment Clause for at least two reasons. First, such application discriminates against religions that encompass stated tenets Hall deems inappropriately "political." If we assume, as we must, that Snyder's prayer is premised on his religious views, then Hall's objection to Snyder's "politics" inevitably amounts to discrimination against his religion as well. Second, development and application of the criteria necessitate a governmental determination of whether religious views are inappropriately political. That kind of determination requires an excessively entangling interaction between the machinery of government and religious practice. *See infra* section III; *cf. Widmar*, 454 U.S. at 272 n.11 (given breadth and indeterminacy of what speech is "religious," state actor risks excessive entanglement by trying to identify and exclude such speech from public facilities).

Invocation of *Marsh* cannot protect such prayer. Once the government steps outside the historically determined confines of *Marsh*, it cannot regulate the content of the prayers it sponsors. The resulting unregulated government prayer sessions come to pose, as this case clearly illustrates, an unacceptable and inevitable risk of the advancement of certain faiths at the expense of others. A prayer session in which Snyder is offered – and takes – the opportunity to denigrate the faith of others is historically and philosophically far-removed from what *Marsh* sanctions as the "tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. As the majority correctly observes, *Marsh* speaks only to legislative prayer of a specific "religious genre." Maj. Op. at 15-16. *Marsh's* reliance on the ecumenism of the Nebraska prayers is not to be ignored – just as it is not to be read to repudiate the Court's entire jurisprudence of excessive entanglement. To be constitutional, legislative prayer must be "part of the fabric of our society," *Marsh*, 463 U.S. at 792, or, as the majority aptly puts it, "a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose," Maj. Op. at 21. If the offerings at a legislative prayer session depart from this historical norm, which – as Mr. Snyder's prayer shows – they assuredly will once Murray City frees the public forum it has created from content-based restrictions, then they can gain no protection from *Marsh*.

Outside the purview of *Marsh*, and subject to the usual canons of Establishment Clause jurisprudence, government-sponsored open prayer sessions marked by uncontrolled proselytizing are unconstitutional. True, the

purpose of an open and unrestricted prayer session may, by analogy to *Marsh*, pass muster under the first step of the three-part Lemon test, 403 U.S. at 612.[8] *See Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984) (city's display of creche has "legitimate secular purposes" of celebrating, and depicting origins of, national holiday). A legislative body's *intention* in maintaining an open prayer session may be simply to "solemniz[e] public occasions, express[ ] confidence in the future, and encourag[e] the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

But the *effects* of such prayer are very different from the situation considered in *Marsh*, precisely because once members of the public are invited to pray, the government must relinquish its power to exclude those prayers that proselytize or disparage. The remedy Snyder would have us endorse for himself and others would require the government to invite proselytizers to initiate its meetings – which it cannot do without violating both the second and third steps of *Lemon*, which proscribe, respectively, "a principal or primary effect" of advancing or inhibiting religion, and "foster[ing] an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (citations omitted). A principal effect of open prayer, as practiced by Snyder and others, will be the symbolic association of government power with religious – and

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[8] In *Lemon*, the Court describes the following test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (1971) (internal quotation and citations omitted).

antireligious – intolerance and bigotry.[9] And the "divisive political potential" of such prayer, which the case law

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[9] The situation would be constitutionally different were the "reverence period" not so significantly characterized by religious activity. *See Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."). Despite Murray City's countless legal pleadings that the reverence period was open to all-comers, religious and non-religious alike, and for purposes similarly religious and non-religious, the record is all but completely devoid of any support for such a conclusion. This may explain why both the district court, *see* Appellant's App. at 597, and the majority today, *see* Maj. Op. at 3, appear to assume that invitations were only extended to religious groups and for the purpose of prayer. From the facts in the record, only one legal conclusion can follow: the "reverence period" is primarily characterized by religious activity. There is simply no way that the content of these sessions is sufficiently secular for them not to advance religion unconstitutionally. *Compare Widmar*, 454 U.S. at 269, 272-75 & n.12 (where state-provided forum is "generally" and "equally" open for use by religious and non-religious groups, allowing religious groups does not have primary effect of advancing religion) *with County of Allegheny v. ACLU*, 492 U.S. 573, 599-600 & n.50 (1989) (Op. of Blackmun, J.) (display of privately-sponsored creche on "Grand Staircase" of county courthouse violates Establishment Clause because "[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays").

The City Attorney's letter of June 1, 1994, to Snyder, states that "the Council has established the policy that all council meetings will start with prayer," Appellee's App. at 195, and defendants' answer to Snyder's amended complaint concedes this point, *see id.* at 5 & Appellant's App. at 82. I cannot agree with the City Attorney's unlikely semantics, whereby prayer does not denote inherently religious activity. (Nor, one might add, could the Supreme Court of Utah. *See Society of Separationists v. Whitehead*, 870 P.2d 916, 931-32 (Utah 1993)).

identifies as a significant component of "excessive entanglement," *see Lemon*, 403 U.S. at 622-23, is self-evident.

Hall appears to concede the religious character of the proceedings when he confirms that the invited groups were "associations" of a "religious nature." Appellee's App. at 71-72. Asked to confirm that prayers were "religious exercise," Hall replies, "Not necessarily," *id.* at 53, but his only substantiation of that qualification is as follows: "We had some Navajos that came and left a blessing and I don't know if it was a religious exercise or not." *Id.* The City Attorney's lack of familiarity with Native American culture simply cannot be enough to render the prayer sessions primarily non-religious in nature. The defendants' answer to Snyder's amended complaint further supports this view by arguing that Snyder's proposed contribution to the reverence period was justifiably refused because "it was not a sincere and earnest entreaty directed to a divinity," and consequently fell outside the definition of "prayer." Appellant's App. at 83.

Murray City points to two items in the record in support of its claim on this point. Neither, in light of the overwhelming evidence to the contrary, can carry any weight whatsoever. The first is a form letter sent to invited groups, which refers to Murray City's effort "to encourage community and religious leaders, representative of the diverse culture of the Salt Lake Valley, to participate in this meaningful segment of our meetings." Appellee's App. at 201. This vague language in a form letter does nothing to obviate the conspicuous failure, save for the erroneous reference to the Navajo blessing, to point to a specific non-religious association to whom an invitation was extended. The second item is Hall's claim that the list of invited parties includes "some nondenominational groups." *See id.* at 69-70. As "nondenominational" does *not* mean "secular," I am unsure why Murray City should believe this renders the proceedings open to all, believers and nonbelievers alike. Indeed, Hall emphasizes how the prayer session differed from the Council's period for comments by individual members of the public, to which Snyder would have been welcome. *See id.* at 56-57. In short, a few evasive and ambiguous statements cannot

"[A] prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral," *Weisman*, 505 U.S. at 588, and that is even more the case when a prayer aggressively proselytizes and disparages the convictions of others present.

This stands in stark contrast to *Marsh*. The ecumenism of *Marsh's* legislative prayer does not advance religion beyond the Supreme Court's general recognition that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The same is true of other "official references to the value and invocation of Divine guidance." *Lynch*, 465 U.S. at 675.[10] But what is true of the prayers in

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support the implausible conclusion that "prayer" has nothing to do with religion. Thus this case conspicuously lacks the "important index of secular effect" that is provided by the "provision of benefits to [a] broad spectrum of groups." *Widmar*, 454 U.S. at 274.

[10] It is for this reason that numerous forms of everyday "ceremonial deism" pass constitutional muster. (This phrase is used in *County of Allegheny*, 492 U.S. at 595 n.46 (Op. of Blackmun, J.), and was coined by Walter Rostow in 1962. *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2091-92 (1996)). An incomplete list of such practices would obviously include the post-1954 Pledge of Allegiance ("under God"); the national motto as inscribed on our national currency ("In God We Trust"); the invocation to the Deity prior to judicial proceedings ("God save the United States and this Honorable Court"); the swearing-in of government officials and witnesses in court proceedings ("so help me God"); public holidays on Christian Holy Days; references to the Almighty in inaugural addresses; and Thanksgiving Day proclamations.

Marsh, the creche in *Lynch*, and the Sunday closing laws in *McGowan v. Maryland*, 366 U.S. 420 (1961), namely that their "reason or effect merely happens to coincide or harmonize with the tenets of some or all religions," *id.* at 442, is assuredly not the case for an open prayer session, sponsored by a legislative body, in which proselytization and disparagement must of necessity be allowed. When the government invites a cross-section of religious parties – proselytizers included – to appear before its meetings, the resulting disparagement of other faiths can hardly be regarded as mere happenstance.[11] Consequently, I cannot agree that this case presents grounds for a remand. Snyder has shown an Establishment Clause violation in the city's exclusion of his prayer, but his requested remedy would violate the Establishment Clause just as surely.

III

The majority assumes that in approving the chaplaincy format before it in *Marsh*, the Court somehow sanctioned a different format which permits a city council routinely to initiate its meetings with an open prayer session at which members of the public are invited to pray. I disagree with that view, just as I would with the proposition that by favorably referring to our customary practice of opening court with the familiar intonement,

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[11] Or, to put it in terms of Justice O'Connor's "endorsement" analysis, *see Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring), Snyder's prayer, if given at an open prayer session before a City Council meeting, would strike an "objective observer" as government endorsement of the disparagement of faith.

"God save the United States and this Honorable Court," *Marsh* somehow would permit us to require the Clerk of the Court to organize a reverence period at the opening of court assuring that representatives of a broad spectrum of religious denominations are included in a prospective list of supplicants invited to seek the blessings of Providence on the proceedings of the day. The very organization of such prayer sessions – in the case at bar, the organization and selection of those delivering prayer is a duty of the Secretary to the City Council, *see* Appellee's App. at 36 – comes perilously close to the establishment of religion.

Certainly, the mere administration of an open prayer session by the government may result in a level of entanglement far beyond that sanctioned by historical practice in *Marsh*. That is so, even when, as a result of the free choice of the invited public, a legislative prayer session is not marked by proselytization or disparagement. In running a prayer session open to the public, the government will need to identify which members of the public appropriately represent the diverse religious life of the community. That will require a government determination of what creeds and philosophies are to count as religious. Given the inevitable limits on the time available for legislative prayer, the government may also have to resolve which are sufficiently representative to earn its favor, and in what order.[12] Finally, as in this case, the government

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[12] According to Mr. Hall, the City Attorney, "[i]ts [sic] impossible when you have only 24, 25 Council meetings to offer everybody the opportunity to pray." Appellee's App. at 159.

will have to distinguish between prayer and political statement.[13]

None of the administrative machinery necessary to such tasks is endorsed by *Marsh*. There, because our social and political history has already made the necessary determinations, there is less need for day-to-day governmental administration of a legislative prayer "system." Because this case is so readily resolved on the two grounds identified above, I need not conclusively determine whether Murray City's administration of its prayer system unconstitutionally entangles government and matters of religion. But legislative bodies should appreciate that an open prayer system has the potential, in its mere administration, to violate the Establishment Clause.

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[13] There is also a grave risk that religious groups will seek to earn the government's favor with the intention of obtaining an invitation, or of increasing the frequency of their invitations, or of being invited to speak before especially significant and visible legislative sessions. In seeking governmental favor, religious groups may become subject to an implicit form of government regulation – a danger that underlies much Establishment Clause jurisprudence. *See Weisman*, 505 U.S. at 609 ("We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular.") (Blackmun, J., concurring). We note in this case that the City Attorney, when asked whether the city inquires as to the content of a prayer prior to its delivery, responded: "As far as I know we've never asked. There has been no need to ask. Everybody has been so positive and met the unwritten guidelines. . . ." Appellee's App. at 155. The Attorney's apparent cause for celebration is – to my mind – cause for grave constitutional concern.

IV

Under the foregoing analysis, government would have to seek the sanctuary of *Marsh* should it wish to maintain legislative prayer. It may appear ironic that the Establishment Clause should endorse official chaplaincies, while proscribing a practice of inviting prayer volunteers who represent many and varied religious faiths. But though this effect may appear establishmentarian, a closer inspection proves otherwise. In fact, the strength and diversity of religious life is doubly benefitted by a legislative retreat to *Marsh*.

First, *Marsh* requires that official chaplaincy systems do not proselytize for one religion or disparage others. Though official chaplains speak with the authority of government to an unparalleled extent, *Marsh* ensures that their pronouncements are broadly ecumenical – no more religious, indeed, than the "fabric of our society" at large. *Marsh*, 463 U.S. at 792. Second, as Madison recognized, "[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment]." James Madison, Memorial and Remonstrance against Religious Assessments (1785), *in The Complete Madison* 309 (S. Padover ed. 1953). As this case shows, when bound to the secular, religion is no longer free to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach*, 343 U.S. at 313.

BRISCOE, Circuit Judge, dissenting:

I respectfully dissent. Underlying the majority's opinion is the implicit assumption that the reverence portion of City Commission meetings is a nonpublic forum in which the speakers, though not paid by or otherwise directly connected to the City, speak on behalf of the City. Based upon this assumption, the majority concludes the City has the right to control or regulate who speaks on its behalf and what message is conveyed. Because I disagree with the majority's underlying assumption, I also disagree with its conclusion that the City properly rejected Snyder's request to speak based upon the content of his proposed prayer.

I.

In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court emphasized the importance of context in determining the extent to which the government can control speech. "[W]hen the State is the speaker," the Court noted, "it may make content-based choices." *Id.* at 833. More specifically, it may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* In contrast, when the State simply facilitates "a diversity of views from private speakers," it may not discriminate based on the viewpoint of a particular private speaker. *Id.* at 834.

It is therefore critical, in deciding Snyder's appeal, to first determine the context in which the dispute arose.

More specifically, it is necessary to decide whether Snyder was denied the opportunity to speak on behalf of the City or whether he was denied the opportunity to speak on his own behalf. As is apparent from the discussion in *Rosenberger*, the determination of this context will have a dramatic effect on how the appeal is analyzed and ultimately decided.

In rejecting Snyder's Establishment Clause claim, the majority implicitly assumes persons who speak during the reverence period do so on behalf of the City. Armed with this assumption, the majority concludes, based upon its interpretation of *Marsh v. Chambers*, 463 U.S. 783 (1983) (deciding constitutionality of opening legislative sessions with a prayer by a chaplain appointed and paid by state), that the City has the right to control the content of messages conveyed during the reverence period, and the City did not violate the Establishment Clause by rejecting Snyder's tendered prayer because, in the majority's opinion, the prayer falls outside the bounds of constitutionally permissible legislative prayer. For reasons that follow, I cannot accept the majority's assumption.

As I indicated in my dissenting opinion from the original panel opinion, I believe "a reasonable observer aware of the City's practice of inviting persons representing a broad range of religious and nonreligious viewpoints to give invocations would not regard Snyder's prayer as representing the City's endorsement of his particular beliefs." *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1357 (10th Cir. 1997) (dissenting opinion). In other words, I do not believe any of the speakers offering prayers during the reverence period could reasonably be perceived as speaking on behalf of the City. *See generally*

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 595 (1989) (endorsement test depends on observer's reasonable perception of particular government policy).

To illustrate the point more thoroughly, I believe it is helpful to review the type of forum with which we are dealing.[1] *See generally Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (applying forum analysis to decide Establishment Clause issue). "[T]he Supreme Court has recognized three distinct categories of government property: (1) traditional public fora; (2) designated public fora; and (3) nonpublic fora." *Summum v. Callaghan*, 130 F.3d 906, 914 (10th Cir. 1997) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983)). Undoubtedly, the reverence period at issue here does not fall within the category of traditional public fora for it is not at all similar to areas such as "streets and parks[,] which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry*, 460 U.S. at 45 (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)). Instead, the reverence period is either a designated public forum or a nonpublic forum.

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[1] Although the scope of our en banc review is purportedly limited to Snyder's Establishment Clause claim, the inescapable fact is that this case lies at the intersection of the Establishment, Free Speech, and Free Exercise Clauses of the First Amendment. Thus, although the concepts of public fora are typically associated with cases involving free speech claims, they are useful in deciding the outcome of this case.

"A designated public forum is property the government has opened for expressive activity, treating the property as if it were a traditional public forum." *Summum*, 130 F.3d at 914. Such a forum "may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." *Perry*, 460 U.S. at 45 n.7. In contrast, a nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* at 46. "Implicit in the concept of the nonpublic forum is the right [of the government] to make distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 802 (1985). To determine whether the government has intentionally created a designated public forum, we look to "the policy and practice of the government," as well as "the nature of the property and its compatibility with expressive activity." *Id.*

Since 1982, the City in this case has incorporated a reverence period as part of the opening ceremonies of its City Council meetings. Speakers during the reverence period are not public officials. Rather, the City has "made efforts to assure that a broad cross-section of the community would be represented" during the reverence period. Appellant's App. at 162. To effectuate this goal, Jewel Chandler, the secretary to the City Council, regularly "compile[s] lists of various denominations and other groups" who she thinks "would be potentially willing to come to the City Council meetings based on invitation to

give a thought, prayer, whatever." Appellee's App. at 36-37. Chandler sends invitations to these groups, which read in part:

> It has long been a custom of the Murray City Municipal Council to include an invocation or inspirational message as part of the opening ceremonies in Council meetings.
>
> Several years ago the Murray City Council undertook a vigorous effort to encourage community and religious leaders, representative of the diverse culture of the Salt Lake Valley, to participate in this meaningful segment of our meetings.
>
> We would, therefore, invite you to be a part of this program by consenting to offer an invocation, appropriate message or inspirational thought at one of our meetings.

Id. at 201. According to the City, participants in the reverence period "have included representatives from Zen Buddhists, Native Americans, a cross section of Judeo-Christian congregations, Quakers, and others." Appellant's App. at 163. The invitations contain no restrictions on the messages that speakers can give. Further, at no time (save for this case) has the City ever asked a particular speaker about content of a message or conveyed any guidelines to a particular speaker. In fact, City Attorney Hall testified:

> I don't have a clue . . . what the Murray Baptist Church is going to say just as I did not have a clue as to what the Zen Buddhists were going to say. I don't know what the religious beliefs are. I

> don't know the particular tenants of their religious beliefs. I don't have a clue what they're going to say.

Appellee's App. at 183. Hall also testified:

> If a person wants to talk in the Buddhist faith about exhortation and blessings, that's fine. If the Navajos want to come in and do what they do. If the Catholics and Buddhists and Baptists and Seventh Day Adventists come in and don't mock city practices and policies and procedures during that period of time, we're not going to determine what their expression of thought or their statements are going to be.

Id. at 157. Finally, prior to Snyder's request to speak, the City had not developed any guidelines concerning the content of messages that could be given during the reverence period.

Taken together, I believe these uncontroverted facts demonstrate an intent on the part of the City to designate the reverence period as a public forum open to members of the community for the purpose of conveying religious and/or inspirational messages. In reaching this conclusion, I find significant (1) the City's goal of having a broad cross-section of the community speak during the reverence period, and (2) the lack of restrictions placed on reverence period speakers. To me, both of these factors indicate the City's intent to treat the reverence period as a setting open to all community members, regardless of religious viewpoint. I also find significant the fact that the reverence period occurs within the broader framework of the City Commission meetings, which themselves are designated public forums given the fact that

citizens are encouraged to attend and voice their opinions. *See Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1296 (7th Cir. 1996) ("Legally created public fora are fora such as school board meetings"), *cert. denied* 117 S.Ct. 1822 (1997); *compare Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (in considering whether university meeting facilities were a public forum, the Court emphasized the campus possessed many characteristics of a traditional public forum), with *Cornelius*, 473 U.S. at 805 (in concluding the combined Federal Campaign charity drive was a nonpublic forum, the Court emphasized the federal workplace, where the drive took place, was a nonpublic forum). With regard to this latter point, a finding that the reverence period is a designated public forum is not inconsistent with the "normal uses" of the overall setting (i.e., the City Commission meetings).

The conclusion that the reverence period is a designated public forum for private religious/inspirational expression demonstrates that the City's ability to control the content of messages conveyed during the reverence period is much more limited than suggested by the majority. "For the State to enforce a content-based exclusion" when dealing with access to any type of public forum, "it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. Although "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech," *Pinette*, 515 U.S. at 761-62, no such interest was present here. Specifically, because Snyder could not have reasonably been perceived as speaking on behalf of the City, there was no necessity for

the City to edit his prayer or deny him the opportunity to speak based on the content of his proposed prayer.[2] *See Pinette*, 515 U.S. at 763 (state could not justify content-based restrictions because there was no potential Establishment Clause violation); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395 (1993) (same); *Widmar*, 454 U.S. at 276 (same).

Ultimately, I believe the City overstepped its bounds and violated the Establishment Clause by rejecting Snyder's request to speak based on its distaste for the content of his tendered prayer. "[T]he [Establishment Clause's] guarantee of neutrality is respected, not

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[2] Even if the reverence period is considered a nonpublic forum, I do not believe the speakers were speaking on behalf of the City. Rather, for many of the reasons already outlined, I believe the City chose to allow private citizens access to the forum to speak on the subject matter of religion and spirituality. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (school district chose to allow private citizens access to nonpublic forum for wide variety of social, civic, and recreational purposes); *see also Summum*, 130 F.3d at 914-19 (discussing nonpublic forums which have been opened for limited access to public). Thus, the only way the City could have properly rejected Snyder is if its decision was "reasonable in light of the purpose served by the forum and [was] viewpoint neutral." *Cornelius*, 473 U.S. at 806 (discussing restrictions on access to nonpublic forum); *see also Grossbaum v. Indianapolis-Marion Bldg. Auth.*, 63 F.3d 581, 587 (7th Cir. 1995). I do not believe the denial of access to the forum would have been reasonable if it was based on concern about a potential Establishment Clause violation, nor do I believe the City Attorney's stated reasons for the denial were reasonable. Rather, I believe the uncontroverted evidence indicates Snyder was denied access solely to suppress the point of view he espoused in his tendered prayer. *Cornelius*, 473 U.S. at 806.

offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839. Here, however, "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the [City's] course of action." *Id.* at 845. In particular, the City's action evinced a hostility toward Snyder's religious viewpoints, and thereby "undermine[d] the very neutrality the Establishment Clause requires." *Id.* Stated in different terms, the City's action clearly had the effect of disapproving of Snyder's religious viewpoints.[3] *See County of Allegheny*, 492 U.S. at 592-93.

In the end, the City cannot have it both ways: it cannot purport to open the reverence period to a broad cross-section of the community without restrictions, while at the same time limiting a particular speaker's access to the reverence period because of its distaste for the speaker's proposed message. Thus, I believe it must either allow Snyder the opportunity to give his tendered prayer or cease its currently-formatted reverence period altogether.

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[3] In my dissenting opinion from the original panel decision, I outlined in greater detail why I believed the City's actions violated the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). 124 F.3d at 1358-60. I continue to stand by my earlier analysis, but find it unnecessary to incorporate all of it into this opinion.

II.

Even assuming, arguendo, I were to accept the majority's assumption that the reverence period is a nonpublic forum in which the speakers offer prayers and messages on behalf of the City, I could not fully join the majority opinion. In particular, I believe the majority has adopted an improper analytical framework that requires it to do precisely what the Supreme Court in *Marsh* was loathe to do: sit as a board of censors on an individual prayer. Further, I am not convinced the majority's framework is useful for determining whether the City acted with improper motives.

Only a minor portion of *Marsh* touches on the propriety of selecting government-sanctioned speakers for invocational prayer sessions. In particular, the appellant challenged the fact that the Nebraska legislature, in carrying out its practice of invocational prayer, had selected a chaplain of only one denomination over a period of approximately sixteen years. The Court rejected this challenge, stating:

> We, no more than members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that [the chaplain] was reappointed because his performance and personal qualities were acceptable to the body appointing him. [He] was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during [his] absences. Absent proof that the chaplain's reappointment stemmed from an impermissible

> motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.

463 U.S. at 793-94. Although the quoted language does not provide us with a precise framework to follow in determining the constitutional propriety of a particular selection (or rejection) decision, it nevertheless provides us with two important principles. First, it expressly indicates we should focus on *evidence* pertaining to the legislative body's reasons for selecting or rejecting a particular speaker. Second, in analyzing such evidence, the ultimate question is whether or not the selection or rejection "stemmed from an impermissible motive." 463 U.S. at 793.

In establishing its framework for reviewing Snyder's claim, the majority acknowledges the second principle, but effectively ignores the first. The majority begins by acknowledging that, in accordance with *Marsh*, a selection decision cannot stem from an impermissible motive. Based upon this principle, the majority then concludes "there is no 'impermissible motive' when a legislative body or its agent chooses to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer." From this conclusion, the majority makes the insupportable leap in logic that the issue of motive can be decided solely by focusing on the content of the proposed prayer. Ultimately, because the majority believes Snyder's proposed prayer falls outside the boundaries of acceptable legislative prayer, it concludes the City acted with permissible motives in rejecting the prayer.

The majority's analytical framework runs counter to *Marsh*. *Marsh* provides prayer content is simply not an issue for the federal judiciary unless a claim is made that an entire practice of legislative prayer has been "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. No such claim has been made here. Thus, by adopting the framework outlined above, the majority ignores the Supreme Court's directive and effectively opens the door to future judicial review of legislative prayers[4] outside the narrow confines outlined in *Marsh*.

Additionally, the majority's analytical framework simply does not do what it purports to do, i.e., ferret out evidence of motive. The fact a reviewing court concludes a tendered prayer is or is not "constitutionally acceptable" says nothing about the motivations of the legislative body that actually rejected the prayer. Indeed, it is entirely conceivable that what turns out to be a "constitutionally unacceptable" prayer could have been rejected by a legislative body based solely on its distaste for the proposed speaker's religious beliefs. On the flip side, if a legislative body rejects a proposed prayer solely because of concern for complying with *Marsh*, the majority would nevertheless apparently infer impermissible motives if it concludes the prayer is "constitutionally acceptable." Both of these examples demonstrate the majority's framework requires absolute perfection on the part of those legislative bodies that attempt to conform their own

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[4] I use the term "legislative prayers" to refer to prayers given on behalf of a legislative body.

prayers to the dictates of *Marsh*.[5] For these reasons, I believe the content of a tendered prayer is, at best, but one piece of evidence pertaining to the issue of motive.

III.

I would reverse the district court's grant of summary judgment and remand Mr. Snyder's Establishment Clause claim for further proceedings.

SEYMOUR, Chief Judge, joins in the foregoing dissent.

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[5] I again emphasize that my criticisms are confined to those situations involving prayer by government speakers. Where, as here, we are dealing with private expression, absolute perfection *is* required because a private party's free speech rights are affected by the government's decision. *See, e.g., Pinette*, 515 U.S. at 763 (rejection of private expression cannot be based on government's incorrect conclusion concerning potential Establishment Clause problem).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

TOM SNYDER, Plaintiff, v. MURRAY CITY CORPORATION, a municipal corporation, and H. CRAIG HALL, City Attorney for Murray City Corporation, Defendants.	MEMORANDUM DECISION AND ORDER (Filed Sept. 13, 1995) Case No. 94-CV-667 G

This matter is before the court on Defendants' Murray City Corporation ("Murray") and H. Craig Hall ("Hall") Motion for Summary Judgment and Plaintiff Tom Snyder's ("Snyder") Motion for Summary Judgment[1] and Motion for Partial Summary Judgment. Plaintiff is represented by Brian M. Barnard, John Pace, and Joro Walker. Defendants are represented Allan L. Larson and Richard A. Van Wagoner. The United States has intervened to present an argument in regard to the constitutionality of the Religious Freedom Restoration Act.

All parties filed memorandums and supporting materials. The court determines that oral argument would not

[1] Plaintiff filed a motion for judgment on the pleadings which this court ruled should be regarded as a motion for summary judgment.

be of material assistance in the resolution of this matter and will decide the motions on the basis of the extensive written materials which have been presented, and the files and records of this case.

FACTUAL BACKGROUND

Since 1982, Murray City Counsel meetings have followed the tradition and practice of beginning with a short prayer in the opening "reverence portion" of the meeting in order to encourage lofty thoughts, pronounce blessings and set an inspirational tone for the balance of the meaning. The Murray City Council invites individuals representing a broad cross section of religious faiths to give these opening prayers.

After the opening prayer or message, there is an open "citizen comment" period in which any citizen has the opportunity to express his or her political views and comments on city practices and policies with no restriction as to content. Citizens may participate in this portion of the meeting without prior notice, or they may arrange prior to any council meeting to be formally scheduled on the meeting's agenda in order to express viewpoints.

On June 9, 1994, plaintiff sent a letter with a "prayer" enclosed[2], which was referred to Murray City Attorney

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[2] The text of the prayer is as follows:

"Our mother, who art in heaven (if, indeed there is a heaven and if there is a God that takes a woman's form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

Craig Hall with the request that plaintiff be allowed to present the statement as a prayer at the next city council

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"We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

"We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats' decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings;

"We ask that you grant Utah's leaders and politicians enough courage and discernment to understand that religion is a private matter between every individual and his or her deity; we beseech thee to educate government leaders that religious beliefs should not be broadcast and revealed for the purpose of impressing others; we pray that you strike down those that misuse your name and those that cheapen the institution of prayer by using it for their own selfish political gains;

"We ask that the people of Utah will some day learn the wisdom of the separation of Church and State; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our gods;

"We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the state of Utah by the actions of misguided, weak and stupid politicians, who abuse power in their own self-righteousness;

"All of this we ask in thy name and in the name of thy son (if in fact you had a son that visited earth) for the eternal betterment of all of us who populate the great state of Utah.

"Amen."

meeting. On June 30, on behalf of Murray City, Mr. Hall sent a letter to plaintiff rejecting this statement as a "prayer" to be given in the opening portion of the meeting, but advising that it could be presented as an agenda item at the public comment portion of the meeting[3] Plaintiff chose not to offer his statement or "prayer" during the public comment portion of any meeting, nor did he request to be put on the agenda. Instead, he filed this suit.

Plaintiff is familiar with the Utah Supreme Court decision in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993) and does not agree with the ruling of the Utah court in that case.[4] Defendants allege that plaintiff's

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[3] Mr. Hall wrote in the June 30 response letter:

"The Municipal Council has not established formal policies regarding the nature and/or content of this reverence portion of their agenda. However, the Council has established the policy that all council meetings will start with prayer.

"The purpose of the 'prayer' is to allow individuals that opportunity to express thoughts, leaves blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies.

"Comments on present city practices or policies may be made at city council meetings by one of two methods; either by requesting to be placed on the agenda, or taking up to three minutes during the 'citizen comment' portion of the meeting. The later method requires no prior arrangements to be made."

[4] In *Whitehead*, the Utah Supreme Court held that the Salt Lake City Council's practice of allowing prayer to be given during the opening remarks portion of city council meetings did not violate the Utah Constitution's prohibitions against union of church and state.

Plaintiff proclaims his disagreement as follows: "I don't like public prayer. I don't think it is proper. I disagree with the Utah Supreme Court. . . . " (Snyder Depo. at 84).

"prayer" constitutes a response to that decision as well as a statement of plaintiff's political views on the separation of church and state and disparagement of persons and the practice of permitting prayers to be given at the opening of city council meetings.

ANALYSIS

Plaintiff asserts seven causes of action: 1) Violation of 42 U.S.C. § 1983 based on the Free Exercise of Religion under the United States Constitution; 2) Violation of the Free Exercise of Religion under the Utah Constitution; 3) Violation of 42 U.S.C. § 1983 based on the Establishment Clause of the United States Constitution; 4) Violation of the Establishment Clause of the Utah Constitution; 5) Violation of 42 U.S.C. § 1983 based on the denial of Federal Due Process; 6) Denial of State Due Process; 7) Violation of the Religious Freedom Restoration Act. The claims asserted under the United States Constitution and the claims asserted under the Utah Constitution will be considered separately.

I. CLAIMS UNDER THE UNITED STATES CONSTITUTION.

Plaintiff brings his federal constitutional claims under authority of 42 U.S.C. § 1983 which permits suits against any

> person who, under color of statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any

> rights, privileges, or immunities secured by the constitution . . .

The Supreme Court has interpreted § 1983 to be applicable to municipalities. In *Monell v. New York City Dept. Of Soc. Serv.*, the Court held:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief . . .

436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). However, for purposes of Eleventh Amendment immunity, the court limited the scope of such actions to governmental units that are not part of the state for Eleventh Amendment analysis. *Id.* at 690 n. 54. Recently, in *Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994), the Supreme Court declared that city and county governments do not enjoy Eleventh Amendment immunity.[5] In light of the *Hess* case, Murray

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[5] The Tenth Circuit arrived at a similar conclusion as to school districts in *Ambus v. Granite Board of Education*, 995 F.2d 992 (10th Cir. 1993). The Utah Governmental Immunity Act defines a "political subdivision" as "any county, city, town, school district, . . . , or other government subdivision or public corporation." Utah Code Ann. § 63-30-2(7). However, whether a state agency is entitled to Eleventh Amendment immunity is a matter of federal law. *Garcia v. Board of Educ. of Socorro Consol. Sch. Dist.*, 777 F.2d 1403 (10th Cir. 1985), *cert. denied*, 479 U.S. 814, 107 S. Ct. 66, 93 L. Ed. 2d 24 (1986).

City Corporation is not entitled to Eleventh Amendment immunity from plaintiff's § 1983 claims.

To prevail under any § 1983 claim, a plaintiff must establish that defendant(s) deprived her of a right, privilege, or immunity secured by the United States Constitution. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).

A. Free Exercise of Religion.

Plaintiff bases the first of his § 1983 claims on defendants' alleged violation of his constitutional right of free exercise of religion.[6] For the following reasons, plaintiff's claim fails as a matter of law.

1. Sincerity of Belief.

The threshold determination for a free exercise of religion claim to survive a dispositive motion is that the religious belief or practice in question is sincere and "truly held" by the party claiming injury.[7] In this regard,

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[6] The First Amendment states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . " This amendment applies to states through the Fourteenth Amendment under clearly established Supreme Court case law.

[7] *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (1989); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981); *Wisconsin v. Yoder*,

the Supreme Court stated in *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965):

> But we hasten to emphasize that while the 'truth' of a belief is not open to question, *there remains the significant question whether it is 'truly held'. This is the threshold question of sincerity which must be resolved in every case.*

(emphasis added). Thus, while it is not the province of this court to question the content of plaintiff's belief, it is the duty of this court to resolve the threshold question of the sincerity thereof and whether it is "truly held" as related to the "prayer" he desires to deliver.

Examination of the text of plaintiff's "prayer" provides a definitive perspective from which the determination of sincerity can be made. On its face, the so-called "prayer" to be offered by plaintiff presents an argument against the tradition of opening meetings with prayer as being akin to the "evil of forced religious worship," and sets forth political comment concerning city practices and policies which are disapproved by plaintiff, rather than sincere religious beliefs.[8] Plaintiff would use the "prayer" as a vehicle to air his views concerning the separation of church and state, and to disparage and "strike down" "misguided, weak and stupid" politicians and government officials who are caught up in the "evil of forced

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406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965); *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993).

[8] Plaintiff admittedly is unsure of his religious beliefs, does not adhere to any particular church or group, does not profess any single faith, and has no definitive structure of religious views. Snyder Depo. at 14-15, 21-25.

religious worship."[9] Moreover, Snyder's "prayer" does not reveal a truly held belief in deity in that it only conditionally addresses a "mother in heaven," i.e. ("if, indeed there is a heaven and if there is a God that takes a woman's form"), and closes conditionally in the name of God's son, i.e. ("if in fact you had a son that visited earth.")

A "prayer", such as plaintiff's, that is not rooted in religion, that is conditional in expression, and that is devoid of truly held religious beliefs, is not afforded protection under the free exercise clause.[10] Furthermore, secular views do not qualify as protected speech under the free exercise clause. *Frazee v. Employment Security Department*, 489 U.S. 829, 833, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (1989) (citing *Seeger* and *Yoder*).[11]

This court determines that on the face of the "prayer" which plaintiff wants to offer, the threshold question of

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[9] *See supra* note 2.

[10] In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. at 713-714, the Supreme Court stated: "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." In *Thomas*, the court held that denial of unemployment compensation to a member of Jehovah's Witnesses, who voluntarily quit his job because of his religious beliefs, was a violation of the free exercise clause of the first amendment. *Thomas* is distinguishable from the case at bar because Snyder claims he does not believe in prayer at city council meetings, but nevertheless wishes to present his prayer in the reverence portion of the council meeting.

[11] In *Frazee*, the Supreme Court stated that "[p]urely secular views do not suffice (to warrant first amendment protection)." 489 U.S. at 833.

whether a sincerely held religious belief exists and is "truly held" must be answered in the negative.[12]

2. Restrictions on the Offering of Prayer and Religious Speech at Public Meetings.

There is an additional reason for determining that plaintiff's "prayer" does not constitute the legitimate free exercise of religion under the United States Constitution. Free exercise of religion does not excuse compliance with an otherwise valid regulation of conduct. *Employment Division, Department of Human Resources v. Smith*, 494 U.S.

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[12] Both parties, as well as the State of Utah as intervenor, address the constitutionality of the Religious Freedom Restoration Act. However, in view of this court's conclusion that plaintiff's free exercise claim is not based on a sincere, "truly held" religious belief, the Murray City policy of providing for prayer only during the reverence portion of its meetings imposes no "substantial burden" on plaintiff's free exercise of religion rights. Moreover, he was given the option of expression during other portions of the council meeting. Accordingly, the court does not reach the constitutional challenge of the Religious Freedom Restoration Act which plaintiff asserts in the wake of *Dept. of Employment Resources v. Smith*. The Alaskan Supreme Court questioned the constitutionality of RFRA in *Swanner v. Anchorage Equal Rights Commission, et al.*, 874 P.2d 274, 280 n. 9 (1994), but the U.S. Supreme Court declined the opportunity to review this question. *Swanner v. Anchorage Equal Rights Commission, et al.*, ___ U.S. ___, 115 S. Ct. 460, 130 L. Ed. 2d 368 (1994). The interesting problem of whether Congress can constitutionally establish an evidentiary standard of "compelling interest" despite the Supreme Court's ruling in *Smith*, which approved of neutral governmental regulations which create no "substantial burden" on religion, must await another day.

872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).[13] Defendants' regulation of the offering of prayers at council meetings requires that such be given during the "reverence portion" at the opening of the meeting, and that such embody lofty thoughts, such as blessings, as distinguished from the expression of political views. This court considers the regulation to be reasonable and that it does not impose a substantial burden on the free exercise clause. To find otherwise would be to grant every individual the ability to disobey otherwise valid laws and

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[13] In *Smith*, the plaintiffs were fired by a drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony at a Native American Church. The Supreme Court held that an Oregon Statute prohibiting the knowing or intentional possession of a "controlled substance" did not violate the free exercise of religion clause of the First Amendment. The Court said:

> We have never held that an individual's religion beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition . . . 'Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.' (quoting *Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (1940)).

494 U.S. at 878-79.

neutral regulations under the guise of free religious exercise.[14]

Plaintiff has neither suffered violation of his free exercise of religion nor his protected free speech rights under the First Amendment. Manifestly, government may place reasonable time, place, and manner restrictions on religious as well as non-religious speech – especially in a non-public forum such as Murray City Council meetings. *See Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (governmental workplace is treated as a non-public forum during hours of government business). The nature of a forum and "the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable". *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

In *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981), the Supreme Court upheld a governmental restriction on the manner of religious expression at a fair. The defendant in *Heffron* challenged the restrictions on similar grounds that plaintiff has challenged those of the Murray City Council. The Supreme Court held that such a restriction does not violate constitutionally protected free speech or free exercise of religion. *Heffron* is apropos to

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[14] The Supreme Court stated in *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 85 L. Ed. 2d 1049 (1941):

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

this case since the plaintiff in that case, like the plaintiff here, was not prohibited from exercising the right of expression only the means of exercising the right was restricted.

In the case of bar, plaintiff was not excluded from the Murray City Council meeting, nor was he prevented from airing his views at the council meeting or in any other forum. Instead, he was asked to give his statement or "prayer" at a later portion of the meeting reserved for public comment.[15] As in *Heffron*, such a restriction does not constitute a violation of either free exercise of religion or freedom of speech.

B. Establishment of Religion.

Plaintiff brings a § 1983 claim based on the Establishment Clause of the First Amendment of the Federal Constitution[16], asserting that by excluding plaintiff's religious expression, defendants have unconstitutionally discriminated against plaintiff's religion and provided preferential treatment to "mainstream" religious views.

A fundamental tenet of the Establishment Clause is that the government shall be neutral and must not favor one religious view over another. *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). In that case the Supreme Court stated:

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[15] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (requiring government to leave open alternative channels of communication in light of regulation).

[16] *See supra* note 6.

> [T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so,' *Lynch v. Donnelly*, 465 U.S. 668, 678, 79 L. Ed. 2d 604, 104 S. Ct. 1355.

Id.

In *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), the Supreme Court held that the Nebraska Legislature's chaplaincy practice did not violate the Establishment Clause. The Court compared the Nebraska Legislature's practice to that of the United States Congress where, since the creation of Congress, prayer has been offered every session. The Court refused to interpret the Establishment Clause as imposing more stringent first amendment limits on the states than are imposed upon the federal government and said:

> The tradition in many of the Colonies was, of course linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain . . . Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.
>
> On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the

> language of the Bill of Rights . . . Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states.

Id. at 793-95.

In *Marsh*, the Court overruled the Eighth Circuit, which had concluded-following application of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), as set out in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973) – that the chaplaincy practice violated all three prongs of the test; i.e. that no secular purpose was presented, that the primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression, and that use of state money for compensation and publication constituted unlawful entanglement. *Chambers v. Marsh*, 675 F.2d 228, 233-35 (1982). The Supreme Court declined to apply the *Lemon* test and simply overruled the Eighth Circuit based on a history of prayer analogous to the practice nationally adopted by the First Congress and followed traditionally since then.

Plaintiff asserts that once a city encourages and allows members of the public to give prayers during the "reverence portion" of its meeting, the Constitution requires the city to keep the forum open and available for

the entire spectrum of religious expression, without restriction of access to the forum based on the content of the religious message to be expressed. Snyder Depo. at 86; Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment at 16-18. To the contrary of the wholly unrestricted approach advocated by plaintiff, the Supreme Court stated in *Marsh* that

> [t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 794-95. This may be taken to signal that the content of a prayer that exploits, proselytizes, disparages other faiths or beliefs, or advances any one religion may require judicial evaluation.

In the case at bar, prayer is a traditional part of the Murray City Council meeting. The practice is reasonably regulated to fit within a designated "reverence portion" of the meeting, rather than the "citizen comment" portion of the meeting reserved for expression of political views and political discussion of city policies or practices. The reverence segment of the meeting is non denominational, non sectarian and non proselyting in character. Plaintiff's "prayer" could properly be presented in the "citizen comment" portion of the meeting, and plaintiff was offered that opportunity. Plaintiff's "prayer" was properly excluded from the "reverence portion" of the meeting, however, because it disparages the faith and beliefs of others, it constitutes political commentary concerning the

city's practices, and it proselytizes and advances plaintiff's belief concerning church and state. This court holds that Murray City's actions which did not allow plaintiff to offer his particular "prayer" during the reverence portion of the meeting, but did provide him with such an opportunity during the public comment portion of the meeting, did not violate the Establishment Clause.

C. Due Process.

Plaintiff claims that his rights under the Fourteenth Amendment have been violated.[17] An essential prerequisite to any claim that the Fourteenth Amendment due process clause has been violated is the existence of a constitutionally cognizable liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Under this court's analysis, plaintiff's religious expression does not pass as a "truly held" statement of belief. Because this threshold requirement is missing, and in view of the adequacy of other easily accessible methods of expression which were made available to plaintiff, no constitutionally cognizable liberty or property interest is implicated here and no substantive due process claim has been violated.

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[17] The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property without due process of law; . . . (emphasis added).*

Plaintiff also asserts violation of his procedural due process rights because the Murray City Council denied him a hearing concerning its decision to reject plaintiff's "prayer." Plaintiff has no right to require the Murray City Council to conduct a hearing on whether plaintiff's "prayer" is fit to be an opening prayer. Moreover, since there was no deprivation of life, liberty, or property, defendants had no due process obligation to provide plaintiff with such a hearing in any event.

II. CLAIMS UNDER THE UTAH CONSTITUTION.

A. Private Actions Under Non-Self Executing Provisions of the Utah State Constitution.

There appears to be no direct statutory or common law private cause of action for violation of provisions of the Utah State Constitution which are not self-executing.[18] In *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990), the Utah Supreme Court recognized an exception in Article I § 22 which relates to just compensation for the taking of private property.[19] In *Colman* the Court held the just compensation section of the Utah Constitution to be self-executing, mandatory, and obligatory. *Id.* at 635. The court noted that whether a particular

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[18] There is no statutory authorization in Utah for the bringing of private actions for violation of civil rights under the Utah Constitution analogous to the Federal Civil Rights Act, 42 U.S.C. § 1981, *et seq.*, under which private actions for violation of the United States Constitution may be asserted.

[19] Article I, section 22 of the Utah Constitution provides:

> Private property shall not be taken or damaged for public use without just compensation.

constitutional provision is self-executing "involves the issue of whether the constitutional provision requires a legislative enactment to be enforced in the courts" *Id.* at 630. The free exercise, establishment, and due process clauses of the Utah Constitution are not self-executing and contain no provision or mechanism for court action or remedy.[20]

The Utah Supreme Court entertained a private cause of action based upon Article I, Section 4, of the Utah Constitution in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993) in order to review a written policy of the Salt Lake City Council.[21] In the case at bar, while

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[20] In *Sauers v. Salt Lake County*, 735 F. Supp. 381, 386 (D. Utah 1990), this court observed:

> [I]n the absence of remedies otherwise expressly provided, there appears to be no general right to a private cause of action for violation of the Utah State Constitution . . .

Of course, whether a private cause of action could be brought for violation of Utah State Constitutional provisions is a matter for determination by the Utah Supreme Court. *Id.* at 386 n. 9. *See also Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989) (Hall, J., dissenting) (noting that no private cause of action under the Utah State Constitution appears to exist since no remedy is provided); *Brown v. Wightman*, 151 P. 366 (Utah 1915).

[21] The Utah Supreme Court in *Whitehead* considered whether the opening ceremony policy for prayers in city council meetings adopted by the Salt Lake City Council was constitutional under the Utah Constitution. That policy provides in part: This opening to the City's legislative process is solely for a secular purpose, among other reasons, to: (1) provide a moment during which Council members and the audience can reflect on the importance of the business before the Council; (2) promote an atmosphere of civility; (3)

Murray City follows a tradition and practice that "all meetings will start with prayer," it "has not established formal policies regarding the nature and/or content of [the] reverence portion" of the meeting.[22] Plaintiff attacks the Murray City practice of permitting prayers insofar as it would exclude his expression, but seeks to participate in the "reverence portion" of the meeting by presenting his "prayer" and insisting that it be presented in that segment. In furtherance of plaintiff's asserted right to do so, he brings direct causes of action under non-self-executing provisions of the Utah Constitution. This court opines and holds that such direct actions may not be asserted under Utah law.

In addition, as is next discussed, this court also opines that plaintiff's claims are barred because defendants are immune from such claims under Utah law.

B. Utah Governmental Immunity Act.

The Utah Governmental Immunity Act (the "Act") provides:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function . . .

Utah Code Ann. § 63-30-3(1) (1993).

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encourage lofty thought and high-mindedness; (4) recognize cultural diversity; (5) foster sensitivity for and recognize the uniqueness of all segments of our community. The presentations are meant to be non-denominational and non-proselytizing in character; however, the City will not dictate the form or content.

[22] *See supra* note 3.

The Act does not provide for waiver of immunity for claims based on the free exercise, establishment, and/or due process clauses of the Utah Constitution as against political subdivisions of the state. A "political subdivision" is defined as any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation. Utah Code Ann. § 63-30-2(7) (1994). It follows that Murray City Corporation is immune from plaintiff's claims under Utah law.[23]

As to governmental employees, such as defendant Murray City Attorney Hall, the Act does not waive immunity from claims for damages asserted in actions which arise from the negligent violation of civil rights.[24] In other actions, such as intentional conduct, the statute provides only a limited waiver for acts "due to fraud or malice."[25] Moreover, in those situations where immunity

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[23] The Supreme Court of Utah has not passed upon the constitutionality of the Governmental Immunity Act as applied to actions based upon the Utah Constitution, and this court declines to do so.

[24] Immunity is waived for a negligent act or omission of an employee committed within the scope of their employment *except if the injury arises out of . . . a violation of civil rights,* Utah Code Ann. § 63-30-10(2) (emphasis added).

[25] The Governmental Immunity Act states:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under the

is waived, the notice and other requirements of the legislation must be met as a conviction precedent to bringing an action.

This court holds that Murray City Attorney, Defendant Hall, is not subject to plaintiff's suit. It appears that the state has not waived immunity of its employees for injuries arising out of alleged negligent violation of civil rights, and that as to other actions for damages against state employees, immunity has been waived only for conduct due to fraud or malice. There is no allegation here of fraud or malice as concerns defendant Hall, or that he was acting outside the scope of his authority or without color of authority. Also, the notice requirements of the Utah Governmental Immunity Act have not been complied with. Accordingly, this court opines and rules that Murray City Attorney Hall is immune from plaintiff's damages claims. In addition, as previously discussed, the said defendant is not subject to a direct lawsuit based upon the Utah Constitution.

Based on the foregoing, it is hereby

ORDERED, Defendants' Motion for Summary Judgment is GRANTED and plaintiff's motions for summary judgment and partial summary judgment are DENIED with respect to claims brought under 42 U.S.C. § 1983 which assert violation of the free exercise of religion, the establishment of religion, the free speech, and the due

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color of authority, *unless it is established that the employee acted or failed to act due to fraud or malice.*

Utah Code Ann. § 63-30-4(4) (1993) (emphasis added).

process clauses of the United States Constitution; it is further

ORDERED, Defendants' Motion for Summary Judgment is GRANTED and plaintiff's motions are DENIED with respect to claims asserted under the Utah State Constitution.

Dated: September 12 1995.

/s/ J. Thomas Greene
J. Thomas Greene
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

TOM SNYDER,	:	
Plaintiff,	:	MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL AND FOR RECONSIDERATION OF JUDGMENT
v.	:	
MURRAY CITY CORPORATION, a municipal corporation, and H. CRAIG HALL, City Attorney for Murray City Corporation,	:	(Filed Nov. 2, 1995)
	:	Case No. 94-CV-667 G
Defendants.	:	

This matter is before the court on Plaintiff Tom Snyder's Motion for New Trial and Motion to Amend Findings and Judgment. Defendants have responded to the motions, and plaintiff has filed a reply.[1] This court determines that oral arguments would be of no material assistance, and will decide the pending motions on the basis of the existing record and the recently filed memorandums.

After due consideration, the court denies plaintiff's motion for reconsideration and for new trial, and grants in part the motion to amend by entering the following additional findings of fact and conclusions of law:

[1] In addition, plaintiff has filed a document entitled "Exhibit Re: Prayers of Episcopal Church."

Findings of Fact

1. Reference to the State of Utah as intervenor in this action is deleted and the United States is substituted therefore at p.8, n.12 of the court's Memorandum Decision and Order dated September 12, 1995. The reference obviously was intended to be the United States rather than the State of Utah.

2. Plaintiff observes that the court addressed plaintiff's claims as though at least in part plaintiff was seeking money damages. Plaintiff's counsel corrects the court by stating that "plaintiff sought no monetary damages under his state law claims," and the court so finds. Accordingly, the court will not further discuss the arguments set forth by plaintiff (Pl.'s Reply Mem. at 4-10) concerning issues of money damages for violation of state constitutional rights and how the Supreme Court of Utah might address such matters in a proper case.

3. All other findings of fact as set forth in the Memorandum Decision and Order dated September 12, 1995, are reaffirmed.

Conclusions of Law

Although most certainly it is here recognized that the Supreme Court of Utah is the final arbiter of state constitutional matters, this court entered its prior Memorandum Decision and Order relative to state law claims only because plaintiff included them for ruling by this court under federal supplemental jurisdiction. In addition to the rulings concerning state constitutional issues entered by this court, and in further support thereof, this court

opines that the Supreme Court of Utah would rule against plaintiff on the merits of the state constitutional claims presented and now sets forth the following conclusions of law:

1. Murray City's prayer policy is not violative of the due process provisions of the Utah Constitution.

The due process provisions of the Utah Constitution and the United States Constitution are similarly worded. In this regard, the Fifth and Fourteenth Amendments to the United States Constitution guarantee that the government shall not "deprive any person of life, liberty, or property, without due process of law . . . ;" and article I, section 7 of the Utah Constitution states that "No person shall be deprived of life, liberty, or property, without due process of law." In the several cases in which the Utah Supreme Court has discussed the interpretation of the Utah due process provisions, federal case law has been relied upon. *See Terra Utilities, Inc. v. Public Serv. Comm'n*, 575 P.2d 1029, 1033 (Utah 1978) (holding that decisions of the United States Supreme Court regarding the due process guarantees of the United States Constitution "are highly persuasive as to the application of that [due process] clause of our state constitution").

It therefore appears to the court that Murray City's refusal to permit plaintiff to deliver his "prayer" at the reverence portion of the City Council meetings is not violative of the due process clause of the Utah Constitution for the same reasons that this court has determined no violation to have occurred as to the federal due process clause.

2. Murray City's prayer policy does not violate the "no public money or property" provisions of article I, section 4, nor does it violate the provision prohibiting "any church [to] dominate the State or interfere with its functions."

For purposes of this discussion, this court will assume without deciding that the informal policy of Murray City concerning prayer before the City Council is tantamount to the formal policy of Salt Lake City discussed by the Supreme Court of Utah in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993). As with Salt Lake City's prayer policy, the Murray City policy does not violate the "no public money or property" provision of article I, section 4 because the subsidy of religion is only indirect, nor does it violate the provision prohibiting "any church [to] dominate the State or interfere with its functions" because the prayer policy does not allow any one religious denomination to dominate or directly interfere with city business. *Id.* at 937-38, 939.

3. Murray City's prayer policy as applied in this case does not violate the remaining religion clauses[2] of

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[2] The religion and conscience clauses of the Utah Constitution are found in article I, section 4, which provides:

> The rights of conscience shall never be infringed.
>
> The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be

the Utah Constitution because such policy as applied is neutral and non-discriminatory and does not constitute a preference of one group or religion over another.

In the case at bar, plaintiff presents an argument that is markedly different from the arguments presented in *Whitehead*. That case concerned a direct challenge to the policy of conducting prayers at the beginning of City Council meetings. By way of contrast, plaintiff does not challenge the Murray City policy of permitting prayer. Instead, plaintiff asserts that once prayer is permitted in City Council meetings, the provisions of article I, section 4 require that the forum for prayer be open and available to any person or group for any type of purported religious message. In this regard, plaintiff contends that his rights under article I, section 4 were violated when he was denied the opportunity to deliver his "prayer" at the reverence portion of a Murray City Council meeting.[3] In

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incompetent as a witness or juror on account of religious belief or the absence thereof.

There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions.

No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

[3] In *Whitehead*, 870 P.2d at 935, the Supreme Court of Utah noted that certain provisions of article I, section 4 "are unique to Utah," but that other provisions at issue in this case "were drawn directly from" the United States Constitution. Despite

support of this argument, plaintiff cites portions of *Whitehead* which stress the paramount importance of neutrality in interpreting application of the Utah Constitution's religion clauses, such as:

> [I]f government allows all groups to apply for [a] benefit but then discriminates in the selection process, it would be preferring one group over the other in violation of the constitutional principle of neutrality.

Id. at 938. In *Whitehead*, the Court found that "the record indicates no preference by the City Council for any religious group or for organized religion in general." *Id.* at 939.

This court determines that Murray City's prayer policy as applied in rejecting plaintiff's request for permission to deliver his "prayer" in the reverence portion of the City Council meeting is consistent with the aforesaid interpretation of neutrality toward religion.

4. Plaintiff's proposed "prayer" is not entitled to protection under the religion clauses of the Utah Constitution.

Not every statement that recites the name of a deity or is structured grammatically and semantically in a manner commonly associated with Judeo-Christian prayers automatically qualifies as a religious expression. Plaintiff's "prayer" is a political statement about the propriety

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the similar language, the Court stated that Utah's unique history may effect a "divergent approach" in the interpretation of the Utah Constitution, resulting in "different meanings and different nuances" than the interpretation of the United States Constitution.

of public prayer set in the framework and language of a prayer, and is akin to a parody.

The Supreme Court of Utah has stated that

> [The religion clauses in the Utah Constitution] are designed to protect *religious* exercise and freedom of conscience in general, to separate government from active financial support of religion, to prevent one religion from dominating the public schools or the government itself, and to prevent the imposition of civil limitations based on one's *religious* beliefs or lack thereof.

Id. at 935 (emphasis added). This court opines and holds that a non-religious activity or viewpoint does not gain protection under the religion clauses of the Utah Constitution simply by being masked in the language of religion. This conclusion is consonant with the extensive historical analysis and philosophical discussion concerning article I, section 4 set forth by the Utah Supreme Court in *Whitehead*. In this regard, this court found in its September 12, 1995, Order that "[p]laintiff admittedly is unsure of his religious beliefs, does not adhere to any particular church or group, does not profess any single faith, and has no definitive structure of religious views." *Snyder v. Murray City Corp.*, No. 94-C-667G, at 7, n. 8. Further, plaintiff has stated: "I don't like public prayer. I don't think it is proper. I disagree with the Utah Supreme Court. . . . " Pl.'s Depo. at 84. Plaintiff voluntarily submitted the text of his "prayer" for review, which was properly determined to be in the nature of a political statement, which plaintiff was allowed to make in the "citizen comment" portion of the City Council meeting.

This court opines that plaintiff's "prayer" is not a religious exercise or activity that is entitled to protection under the religion clauses of article I, section 4 of the Utah Constitution.

For the foregoing reasons, including the additional findings and conclusions set forth herein, plaintiff's motion for new trial and to amend judgment is hereby DENIED.

Counsel for defendants is directed to lodge with the court a form of judgment consistent with this and the court's September 12, 1995, Order, after first complying with local rule D. Ut. 206.

It Is So Ordered.

Dated: November 2nd 1995.

/s/ J. Thomas Greene
J. Thomas Greene
United States
District Judge

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

TOM SNYDER, Plaintiff-Appellant, vs. MURRAY CITY CORPORATION, a municipal corporation; H. CRAIG HALL, City Attorney for Murray City Corporation, Defendants-Appellees.	)	No. 96-4087 (Filed Sep. 10, 1997)
UNITED STATES OF AMERICA, Intervenor.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 94-CV-667)

Brian M. Barnard (Andrea Garland and the Utah Legal Clinic, with him on the briefs), Cooperating Attorneys for Utah Civil Rights & Liberties Foundation, Inc., Salt Lake City, Utah, for Plaintiff-Appellant.

Allan L. Larson (Richard A. Van Wagoner, with him on the brief), Snow, Christensen & Martineau, Salt Lake City, Utah, for Defendants-Appellees.

Before KELLEY, HOLLOWAY, and BRISCOE, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff Tom Snyder appeals from the district court's grant of summary judgment in favor of Defendants Murray City and H. Craig Hall, the City Attorney of Murray City. In his 42 U.S.C. § 1983 action, Mr. Snyder alleged that Murray City's refusal to permit him to speak during the reverence portion of a Murray City Council meeting violated his rights under the United States Constitution. He also alleged violations of the Religious Freedom Restoration Act and the Utah Constitution. The talk Mr. Snyder desired to present – which he characterizes as a prayer and the City characterizes as a diatribe against City officials[1] – requests the "Mother in Heaven" to cause the cessation of prayers at public meetings. We exercise jurisdiction under 28 U.S.C. § 1291, and affirm in part and reverse in part.

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[1] We recognize that the parties disagree over whether Mr. Snyder's proposed speech was a prayer and whether Murray City denied his request. The City's letter to Mr. Snyder informed him that, until his "proposed prayer satisfies [the City's] guidelines, an invitation to participate in our opening ceremonies will not be forthcoming." The City also advised Mr. Snyder that he could request a place on the meeting agenda or voice his thoughts during the citizen comment portion of the meeting. For ease of reference, however, we adopt the terminology used by the parties and refer to Mr. Snyder's talk as a prayer and the City's action as a denial of his request to deliver his prayer.

Background

Since 1982, Murray City has opened its city council meetings with a reverence period, during which an invocation or devotional is presented. The reverence portion of the meetings is designed to encourage lofty thoughts, promote civility, and cause the participants to set aside other matters in order to focus on the topics to be addressed at the meeting. The city council extends invitations to speak during the reverence period to individuals representing a broad cross-section of religious faiths, and invocations or devotionals have been presented at the Murray City Council meetings by Christians, Navajos, Quakers, and Zen Buddhists. One speaker simply requested a moment of silence. Mr. Snyder, who does not reside in Murray City, wrote to the City, advising of his interest in presenting a prayer at a council meeting. Mr. Snyder attached his two-page proposed "Opening Prayer" to the letter.[2] Mr. Snyder's request was part of his

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[2] Mr. Snyder's proposed prayer read as follows:

OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a God that takes a woman's form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

We fervently ask that you guide the leaders of this city, Salt Lake County and the State of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the

personal campaign to stop prayers at public meetings, waged in response to a recent decision of the Supreme Court of Utah which upheld Salt Lake City's practice of opening public meetings with a prayer.

Although Mr. Snyder was reared as a member of the Church of Jesus Christ of Latter-Day Saints, he is no longer a practicing member of that faith, or any other organized religion. He testified that he considers himself deeply religious, but is not yet sure what his beliefs are,

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people believe that bureaucrats' decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings;

We ask that you grant Utah's leaders and politicians enough courage and discernment to understand that religion is a private matter between every individual and his or her deity; we beseech thee to educate government leaders that religious beliefs should not be broadcast and revealed for the purpose of impressing others; we pray that you strike down those that misuse your name and those that cheapen the institution of prayer by using it for their own selfish political gains;

We ask that the people of the State of Utah will some day learn the wisdom of the separation of church and state; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our Gods;

We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the State of Utah by the actions of mis-guided, weak and stupid politicians, who abuse power in their own self-righteousness;

All of this we ask in thy name and in the name of thy son (if in fact you had a son that visited earth) for the eternal betterment of all of us who populate the Great State of Utah.

Amen.

and leans towards agnosticism. Mr. Snyder cites the Book of Mormon and the Gospel of St. Matthew as the religious bases for his prayer. He believes that prayer should be a private matter between an individual and his or her God, and that Jesus Christ opposed public prayers, including those before government meetings. Although Mr. Snyder testified at his deposition that he believes in God, he also testified that he questions God's existence.

On behalf of Murray City, Mr. Hall responded to Mr. Snyder's request and informed him that his proposed prayer was unacceptable because it did not follow the guidelines for prayers which the City had previously provided to Mr. Snyder. Although the council had no formal, written policy, Mr. Snyder had been informed by letter prior to the submission of his proposed prayer that "the purpose of the 'prayer' is to allow individuals [the] opportunity to express thoughts, leave blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies." Mr. Snyder had also been advised that comments on City practices and policies could be made during city council meetings either by requesting a place on the meeting agenda or by speaking during the citizen comment portion of the meeting. The citizen comment portion of the meeting immediately follows the reverence portion.

Mr. Snyder filed this § 1983 action upon receiving in the mail Murray City's denial of his request to give a prayer. He alleges that the City's refusal of his request violated his rights under the United States and Utah Constitutions to free exercise of his religion and to due process. Mr. Snyder also alleges violations of the Establishment Clause of both Constitutions, and the Religious

Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4. Both Defendants and Mr. Snyder moved for summary judgment, which the district court granted in favor of the Defendants and denied to Mr. Snyder, who brings this appeal.

Discussion

Our review of questions of constitutional law and dispositions on summary judgment is de novo. *United States v. One Parcel Property*, 106 F.3d 336, 338 (10th Cir. 1997).

I. Claims Under the United States Constitution

Mr. Snyder brings this action under 42 U.S.C. § 1983. To prevail in a § 1983 claim, a plaintiff must establish that the defendants, while acting under color of state law, deprived him of a right, privilege, or immunity secured by the United States Constitution. We therefore consider whether Murray City's denial of Mr. Snyder's request to deliver his proposed prayer during the reverence portion of a city council meeting violated his rights under the Free Exercise, Establishment, or Due Process Clauses of the Federal Constitution.

In his briefs, Mr. Snyder relies upon case law interpreting the Free Speech Clause of the First Amendment. Since he did not allege a violation of his right to free speech, however, we need not consider the arguments raised under that body of law.

A. Free Exercise Claim

The first questions in any free exercise claim are whether the plaintiff's beliefs are religious in nature, and whether those religious beliefs are sincerely held. *United States v. Seeger*, 380 U.S. 163, 185 (1964). Only beliefs which are religious in nature are protected by the Free Exercise Clause. Nevertheless, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

Although Mr. Snyder swore out affidavits attesting to his sincerity, the district court held that he was not sincere in the beliefs espoused in his proposed prayer. The district court reached this conclusion based upon the text of Mr. Snyder's prayer, which the court found to contain political instead of religious content, and on Mr. Snyder's deposition testimony that he was unsure of his religious beliefs. The inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment, *see Seeger*, 380 U.S. at 186; *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991), and therefore the issue of sincerity can rarely be determined on summary judgment. This may well be, however, one of those very rare cases in which the plaintiff's beliefs are "so bizarre, so clearly nonreligious in motivation" that they are not entitled to First Amendment protection. *Thomas*, 450 U.S. at 715.

Regardless, we need not decide whether Mr. Snyder's beliefs are religious in nature nor whether they are sincerely held. Nor need we address Mr. Snyder's

argument that summary judgment was inappropriate. Even assuming that Mr. Snyder is possessed of sincerely held religious beliefs, as articulated in his proposed prayer, we find that Mr. Snyder's claim is not cognizable under the Free Exercise Clause. In fact, Mr. Snyder's arguments evince a fundamental misconception about the rights bestowed by the Clause.

The Free Exercise Clause is one of the Bill of Rights's "thou shall not" prohibitions against certain government actions. The Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). To protect "the right to believe and profess whatever religious doctrine one desires," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), the Free Exercise Clause prohibits the government from impermissibly burdening an individual's free exercise of religion. However, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

The Free Exercise Clause does not guarantee any person the right to pray whenever and wherever he chooses. Nor does the Clause guarantee a person the right to speak during portions of public meetings set aside for devotional or invocational purposes. Suggestion to the contrary is inconsistent with both common sense and constitutional doctrine. *Cf. Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any

manner that may be desired."). We find no violation of the Free Exercise Clause.

B. Establishment Clause Claim

Mr. Snyder claims that Murray City's denial of his request to speak at the reverence portion of its city council meeting violated the Establishment Clause. This argument also misapprehends the protections afforded by that Clause. The Establishment Clause assures that the government will not favor a particular religion, nor religion over nonreligion. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Like the Free Exercise Clause, the Establishment Clause is a prohibition against certain government actions. The Establishment Clause does not give any individual the right to establish his religion by guaranteeing an opportunity to pray during public meetings, and certainly does not require Murray City to permit all comers to speak during the reverence portion of its city council meetings.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld the constitutionality of opening governmental meetings with prayers. The Court observed that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. "To invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment. . . . " *Id.* at 792.

Mr. Snyder does not argue that Murray City's practice of opening its city council meetings with prayer

violates the Establishment Clause. *Marsh* appears to foreclose such an argument. Instead, Mr. Snyder argues that Murray City violated the Establishment Clause by permitting others to pray, yet denying him the same opportunity. *Marsh* suggests that a governmental body's practices in selecting persons to deliver prayers at public meetings may violate the Establishment Clause if the selections are the product of impermissible motives. *Id.* at 793. The record in this matter is devoid of evidence suggesting that Murray City had impermissible motives either in extending invitations to speak, or in denying Mr. Snyder's request.[3] Similarly absent is any suggestion that Murray City used the reverence portion of its city council meetings to advance a particular faith or to disparage any faith or belief. *See id.* at 794-95. In contrast, Mr. Snyder's

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[3] Conceding that no actual evidence of improper motive exists, the dissent attempts to create a material issue of fact sufficient to justify a trial by citing a collection of supposed inferences. Dissent at 9-10. A mere demonstration that the City denied Mr. Snyder's request because of the content of his prayer does not prove a violation of the Establishment Clause. To survive the motion for summary judgment, Mr. Snyder was required to produce evidence from which reasonable jurors could find by a preponderance of the evidence that the City had an impermissible motive, *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986); in other words, that the City denied Mr. Snyder's request because it preferred another religion, or nonreligion, over his religion. Genuine issues of material facts may be founded upon inferences; however, those inferences must be *reasonable* inferences, and must amount to more than a scintilla of evidence. *Id.; see also Black v. Baker Oil Tools*, 107 F.3d 1457, 1460 (10th Cir. 1997). Even assuming that a collection of inferences can create a genuine issue of material fact, this record cannot reasonably be considered to have created such an issue.

prayer itself disparages those who believe in the propriety of public prayer. Clearly, the content of Mr. Snyder's prayer is in conflict with the City's legitimate objectives in presenting such prayers. *Marsh* controls the issue before us, and we find no violation of the Establishment Clause.

C. Due Process Claim

Because Mr. Snyder's First Amendment claims are without merit, his claim under the Federal Due Process Clause also fails. It is beyond argument that process is due only when the government terminates a protected interest. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Mr. Snyder was not deprived of any protected interest and therefore he had no entitlement to any sort of process.

II. Religious Freedom Restoration Act Claim

Mr. Snyder appeals from the district court's adverse decision on his RFRA claims. Since this case was argued, however, the Supreme Court has held RFRA unconstitutional. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). We therefore need not consider the merits of Mr. Snyder's RFRA claims.

III. Claims Under the Utah Constitution

Mr. Snyder also alleges that the City's denial of his request violates the Free Exercise, Establishment, and Due Process Clauses of the Utah Constitution. Although the district court did not reach the merits of these state-

law claims, it ruled against Mr. Snyder, finding that the provisions of the Utah Constitution were not "self-executing" and therefore did not provide a cause of action.

We have held that when federal claims are resolved prior to trial, the district court should usually decline to exercise jurisdiction over pendent state law claims and allow the plaintiff to pursue them in state court. *See Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995). We believe this general practice is particularly appropriate in this case.

The Supreme Court of Utah recently rejected a challenge to Salt Lake City's practice of opening its city council meetings with a prayer. *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993). While that challenge was brought under the provision of Utah's Constitution which prohibited the expenditure of public monies for religious purposes and not under its Free Exercise or Establishment Clauses, the Supreme Court of Utah stated in *Society of Separationists* that it would not follow federal constitutional models in interpreting the Religion Clauses of the Utah Constitution. *Id.* at 930, 931 n.36. Given that the interpretation of those Clauses appears to be undergoing an evolution, and given the complex issues of state law presented, we decline to exercise supplemental jurisdiction over Mr. Snyder's state-law claims.

We therefore reverse as to the state-law claims and remand them to the district court with instructions to dismiss without prejudice.

AFFIRMED in part, REVERSED in part, and REMANDED to the district court.

BRISCOE, Circuit Judge, concurring and dissenting:

Federal Free Exercise Claim

I concur with the majority's conclusion that Snyder failed to establish a federal free exercise claim. I agree that the Free Exercise Clause did not guarantee Snyder the right to give his prayer as the opening prayer at city council meetings, and that by excluding Snyder's prayer the City did not impermissibly burden Snyder's right to believe and profess his religious doctrines. His claim is not cognizable under the Free Exercise Clause.

However, I disagree with any suggestion that Snyder's claim could be rejected at the summary judgment stage on the ground that his beliefs are not religious in nature. In reviewing the grant of summary judgment, we examine the factual record and reasonable inferences drawn from it in the light most favorable to the party opposing summary judgment. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). The record contains evidence that the beliefs expressed in Snyder's prayer have a religious basis, and whether religious beliefs are sincerely held is a question of fact. *Mosier v. Maynard*, 937 F.2d 1521, 1523 (10th Cir. 1991). *See United States v. Seeger*, 380 U.S. 163, 176 (1965). The record does not support a conclusion that the beliefs expressed by Snyder are so bizarre or so clearly nonreligious in nature that the district court could properly resolve the issue on summary judgment.

Religious Freedom Restoration Act Claim

I concur with the majority's conclusion that after *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), we need not consider the merits of Snyder's Religious Freedom Restoration Act claim. The Court held in *Boerne* that RFRA's restrictions on state and local government actions affecting religion are unconstitutional.

Claims under Utah Constitution

I also concur with the majority's conclusion that it was an abuse of discretion for the district court to exercise supplemental jurisdiction to decide the delicate state constitutional issues. We cannot predict from *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), how the Utah Supreme court would decide the state constitutional issues in this case.

Federal Establishment Clause Claim

I respectfully dissent from the majority's conclusion that Snyder's federal Establishment Clause claim is precluded by *Marsh v. Chambers*, 463 U.S. 783 (1983). There are significant differences between this case and *Marsh*. The sole issue in *Marsh* was whether the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the state violated the Establishment Clause. Using a purely historical analysis, the Court concluded the practice did not establish religion in violation of the First Amendment. The Court reasoned the practice did not establish religion within the meaning of the First Amendment because the First Congress that

drafted the Bill of Rights hired chaplains to give prayers at sessions of Congress. The practice of opening legislative sessions with prayer by a chaplain paid by the government is not an establishment of religion within the meaning of the First Amendment, but "is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792.

Here, the City did not hire or appoint a chaplain as its official religious spokesperson, which was the sole practice at issue in *Marsh*. Instead, the City sponsored a forum for private individuals to engage in prayer at city council meetings and excluded Snyder from that forum because of the content of his prayer. Snyder does not challenge the City's practice of sponsoring prayer at its council meetings. He challenges only his exclusion from the City-sponsored forum for prayer based on the unacceptable content of his proposed prayer.

Marsh is distinguishable from this case for three reasons. First, the historical record does not support censorship of prayer by private individuals at the start of government meetings. Second, prayer by private individuals at the start of meetings of governmental bodies is fundamentally different from prayer by a chaplain who is appointed as the official paid religious spokesperson for the governmental body. Third, the record contains circumstantial evidence that the City had impermissible motives for excluding Snyder's prayer.

Although from *Marsh* we know the members of the First Congress who drafted the First Amendment believed appointment of chaplains did not violate the Establishment Clause, we simply do not know what they

would have thought about censorship of prayer at a government-sponsored forum for prayer by individuals at the start of meetings of a legislative body. The censorship of chaplains' prayers at government meetings does not find support in the actions of the First Congress. Research reveals no historical record of the prayers offered by the chaplains of the First Congress. The record of debates and proceedings in the first eighteen congresses in the *Annals of Congress* do not include chaplains' prayers[4] and, other than the decision of the First Congress to appoint two chaplains of different denominations, one by each house to interchange weekly, *see* 1 Annals of Congress 968, 1077, 1773, there appears to be no record of the measures, if any, taken by Congress to control the content of such prayers.

Marsh suggests that chaplains' prayers could be censored without violating the Constitution. The Court suggested that to be lawful, a legislative chaplain's prayer must be nonsectarian and non-proselytizing:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95.

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[4] Nor does the *Congressional Globe*, which covers the mid-19th century. The opening prayers of congressional chaplains were not recorded in the Congressional Record from its start in 1873 until the early twentieth century.

Conversely, the content of sectarian, proselytizing prayer by a legislative chaplain would be of concern to the courts as a possible establishment of religion. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 603 (1989). Such prayer by a legislative body's official religious spokesperson could reasonably be viewed as governmental endorsement of a particular religion in violation of the Establishment Clause. Consequently, it may not violate the Establishment Clause for a government official to determine whether a chaplain's prayers are sufficiently nonsectarian and nonproselytizing in order to avoid violating the Establishment Clause. Censorship or control of the content of a legislative chaplain's prayers could be justified only by the need to avoid violating the Establishment Clause by keeping the prayers within the limits allowed by *Marsh*.

It is true Snyder's proposed prayer was proselytizing in nature because it was intended to convert listeners to his point of view on the impropriety of prayer at a governmental function. It is also true that although Snyder was not a member of any organized religious sect, his prayer was sectarian in the sense that it represented his particular beliefs and did not attempt to encompass shared beliefs. However, Snyder is not a chaplain hired or appointed to be the City's official religious spokesperson. The prayers at the start of the city council meetings are not offered by a chaplain, but by members of the public representing a broad range of religious beliefs. The Establishment Clause's guarantee of government neutrality toward religion is not offended, but respected, when the government, following neutral criteria and evenhanded policies, gives access to a forum to recipients whose

ideologies and viewpoints, including religious ones, are broad and diverse. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 2521 (1995). *See also Board of Education v. Mergens*, 496 U.S. 226, 248-49 (1990); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). If the City permitted Snyder to offer his prayer, a reasonable observer aware of the City's practice of inviting persons representing a broad range of religious and nonreligious viewpoints to give invocations would not regard Snyder's prayer as representing the City's endorsement of his particular beliefs. Consequently, permitting the prayer would not have violated the Establishment Clause. *See Rosenberger*, 515 U.S. at 2523; *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 2450 (1995); *Mergens*, 496 U.S. at 2372; *see also Capitol Square*, 115 S. Ct. at 2455 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring). Because permitting Snyder's prayer would not have violated the Establishment Clause, justification for permitting governmental censorship or control of the content of chaplain's prayers suggested by *Marsh* is not present here.

Marsh also suggests that a governmental body's selection of persons to deliver prayers at its meetings may violate the Establishment Clause if the selections are the product of impermissible motives. I disagree with the majority's conclusion that the record is devoid of evidence suggesting the City had impermissible motives in denying Snyder's request to offer his prayer. I do not, as footnote 3 of the majority opinion asserts, concede there is no *actual* evidence of impermissible motive. There is no *direct* evidence, but there is circumstantial evidence of

impermissible motive. Direct evidence of discriminatory intent is rarely available, and it is not a novel proposition to say that intent may be proved by circumstantial evidence. *See, e.g., Denison v. Swaco Geolographic Co.*, 941 F.2d 1416, 1420 (10th Cir. 1991). Viewed in the light most favorable to Snyder, the record supports an inference that the guidelines were drafted specifically to exclude Snyder's prayer because its content was offensive.

Snyder wrote to the City in March 1994, expressing interest in presenting a prayer at a council meeting and asking if there were any guidelines or restrictions on such prayers. Snyder received no reply and wrote again in May, again expressing interest in presenting a prayer and inquiring about any guidelines or restrictions. His request was forwarded to H. Craig Hall, City Attorney of Murray City, who answered Snyder's letter on June 1, 1994.

The City had no formal, written guidelines or restrictions on prayers before council meetings until Snyder asked if there were any. Persons asked to give invocations were simply asked to give an "invocation, appropriate message, or inspirational thought." (Appellant's append. at 281.) According to Hall, since the prayers began in 1982, a custom and practice of "positive, upbeat" prayers "exhorting the City Council to do what they ought to do under their statutory responsibilities" had developed. No one had ever attacked City policies or the council during an invocation.

By the time Snyder made his request, the City Council of Salt Lake City had decided not to have prayer at the opening of council meetings rather than deal with a request by Snyder that he be permitted to deliver a

prayer virtually identical to the prayer at issue in this case. Snyder's prayer was likely to offend a great many people of a variety of Christian faiths on religious grounds. The prayer questions the divinity of Jesus and the existence of heaven, and expresses a belief that God may take the form of a woman. These views are controversial, to say the least. Snyder's proposed prayer and the decision of the Salt Lake City Council were reported in the newspapers. Hall had read newspaper articles about Snyder's request to present the prayer at a Salt Lake City Council meeting, and this knowledge influenced his response to Snyder's request. The record establishes that Hall believed (correctly, as it turned out) Snyder would propose a similar or identical prayer to Murray City, and he drafted his response to exclude the expected prayer. This response constituted the City's first written or unwritten guidelines for prayer at council meetings. In his letter to Snyder, Hall stated that acceptable invocations, inspirational messages, or prayers must not "express political views, attack City policies or practices or mock City practices or policies." (Appellant's append. at 10.) In his deposition, however, he said that not all political views are prohibited; apparently only views critical of the council or its policies and practices.

Upon receiving Hall's response, Snyder sent a copy of his prayer and a request that he be permitted to offer it at a council meeting. On June 30, Hall responded with a letter stating the text of the proposed prayer was "unacceptable" under the guidelines set out in his letter of June 1. (Appellant's append. at 14.) The next month, the City

invited the pastor of a local church to deliver an invocation and the invitation made no mention of any guidelines or restrictions.

The record would support inferences that the City had no restrictions on the content of prayers until Snyder made his request, that the restrictions were drafted specifically to exclude Snyder's prayer, and that the restrictions were not applied to others. Although there was evidence the City had the permissible motive of promoting civility, and although there was no direct evidence of impermissible motives, the circumstantial evidence is sufficient to support an inference that the City acted to exclude Snyder's prayer because it found the content offensive. Because the record contains evidence the City acted with impermissible motives, *Marsh* cannot justify entry of summary judgment for the City.

Because *Marsh* is not controlling, determining whether the City's exclusion of Snyder based on the content of his prayer violates the Establishment Clause requires further analysis. The long-standing test for determining whether government action violates the Establishment Clause first set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), has been modified in recent cases. Under the *Lemon* test, government action regarding religion violates the Establishment Clause unless it meets three conditions: (1) It must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. The Court has in some cases recast the first and second parts of the *Lemon* test to ask whether the challenged government action was intended to endorse or disapprove, or

has the effect of endorsing or disapproving, religion. *See County of Allegheny*, 492 U.S. at 592-93; *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir. 1995), *cert. denied* 116 S. Ct. 1702 (1996). In *Agostini v. Felton*, 117 S. Ct. 1997, 1997 WL 338583 *19-20 (1997), the Court explained that entanglement is properly understood as an aspect of an inquiry into the effect of the government action rather than as a separate factor in the test.

The stated purpose for the City's exclusion of Snyder's prayer was secular – to promote civility at city council meetings. However, as discussed above, the record supports an inference that the City drafted its prayer guidelines and applied them only to Snyder because it found the content of his prayer offensive. On this record, whether the stated purpose was a pretext for impermissible motives is a question of fact. The exclusion of Snyder's prayer also had the effect of expressing disapproval of his religious views. A reasonable observer familiar with the City's practices could conclude from exclusion of the prayer that the City disapproved of Snyder's beliefs. *See Chandler v. James*, 958 F. Supp. 1550, 1566 (M.D.Ala.1997).

The City's censorship of the content of the prayer also constitutes excessive entanglement. Governmental monitoring and control of the content of prayer inevitably establishes religion by entangling the government in religious issues. "[R]eview of prayers by government officials is one of the very practices which the First Amendment was designed to prevent. The framers knew that government involvement with one's religious practices

would inevitably taint the sanctity of one's faith." *Chandler*, 958 F. Supp. at 1566 (holding statute permitting student-led, nonsectarian, nonproselytizing prayer in public schools unconstitutional). *See also Ingbretsen v. Jackson Public School District*, 88 F.3d 274, 279 (5th Cir.), *cert. denied* 117 S. Ct. 388 (1996). In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court held prayer at a high school graduation by a clergyman invited by the principal violated the Establishment Clause. The Court did not apply the *Lemon* or endorsement tests, but focused on the susceptibility of high school students to coercion. However, the Court in effect found excessive entanglement in concluding the principal's control over the content of the prayer offended the Establishment Clause. The Court concluded: "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government,' and that is what the school officials attempted to do." 505 U.S. at 588 (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

Similarly, in *Sands v. Morongo Unified School Dist.*, 809 P.2d 809 (1991), *cert. denied* 505 U.S. 1218 (1992), the court held a school district's attempt to control the content of high school graduation prayers constituted excessive entanglement. To allow preventive monitoring by the state of the content of religious speech inevitably leads to gradual official development of what is acceptable public prayer. 'This result is as contrary to the requirements of the Establishment Clause as is . . . composition of an official state prayer.' " 809 P.2d at 818 (quoting *Weisman v.*

Lee, 728 F. Supp. 68, 74 (D.R.I. 1990), *aff'd* 505 U.S. 577 (1992)).

Courts that have rejected Establishment Clause challenges to state and local legislative prayer have also recognized the risk of excessive entanglement even as they upheld the practice in general. In *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979), the court rejected an Establishment Clause challenge to a county board's practice of opening meetings with prayer by an unpaid local clergyman. However, the court stated:

> We would be less than candid if we did not warn the county of the quagmire it is near. Up to the time of oral argument, all persons delivering invocations were members of the Christian faith. We have no reason to believe that persons of any religious persuasions have volunteered and been turned down by the board. If in the future this should occur the board will be in a very difficult position to defend against an allegation that it is excessively entangled in religion by giving public approval to some groups while denying it to others.

598 F.2d at 1114. In upholding a statute authorizing the use of public funds to pay salaries of chaplains for the state legislature, the Massachusetts Supreme Court noted:

> There is no evidence that a great degree of government entanglement with religion is occasioned by the employment of legislative chaplains. The prayers offered are brief, *the content unsupervised by the State*, and attendance completely voluntary. There is *no evidence that the State has become embroiled in any difficult decisions about which religions are to be represented or what sorts of invocations are to be offered.*

Colo v. Treasurer and Receiver General, 392 N.E. 2d 1195, 1200 (Mass. 1979) (emphasis added). *See Lincoln v. Page*, 241 A.2d 799, 800 (N.H. 1968); *Marsa v. Wernik*, 430 A.2d 888, 901 (N.J. 1981) (Pashman, J., concurring).

Not all government oversight of religious activities violates the Establishment clause – the entanglement must be excessive. Although mere custodial oversight of religious activities at a government-sponsored forum does not constitute excessive entanglement, *see Mergens*, 496 U.S. at 253, the censorship of prayer goes far beyond mere custodial oversight, and strikes at the heart of the Establishment Clause. Moreover, if the City applied its guidelines to all prayers at council meetings, the censorship would be regular and frequent. In *Lemon*, 403 U.S. at 620, the Court held state aid to parochial schools violated the Establishment Clause because of the monitoring required to ensure that teachers paid with public funds did not teach religion. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church." Here, if Murray City were to consistently apply its prayer guidelines and review all prayers before its meetings, the city attorney would have to censor prayers approximately thirty-six times a year.

I recognize that the invocation ceremony at the start of city council meetings is not a public forum open for indiscriminate public speech by the general public. It is a limited forum from which the government may exclude a speaker who wishes to address a topic not encompassed

within the purpose of the forum, although it cannot exclude a speaker solely to suppress a point of view espoused on an otherwise includible subject. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985). *See Rosenberger*, 115 S. Ct. at 2516-17; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-94 (1993). The City limited the forum to speech appropriate for an invocation ceremony. The stated purpose of the invocation ceremony was to promote civility, solemnize the occasion, and encourage concentration on the matters on the agenda by appropriate inspirational messages, including prayers. When confronted with a prayer it deemed inappropriate for the invocation, the City drew up guidelines prohibiting prayer expressing political views or attacking or mocking City policies and practices. Such prayer would not tend to promote civility or solemnize the occasion.

The City could not properly exclude prayer attacking or mocking the city council or its policies and practices unless it also excluded prayer defending or supporting the council and its policies and practices. Otherwise, it would be allowing prayer on political matters, but from only one point of view. The guidelines purported to exclude all prayer expressing political views, but the record indicates some political views were permitted, and the record would support an inference that the City drafted its guidelines specifically to exclude Snyder's religious views.

Moreover, even neutral exclusion of all prayer expressing political views would violate the Establishment Clause. The City specifically invited religious speech in the form of prayer. Neutral enforcement of the

rule prohibiting prayer expressing political views would entangle the City in religion by requiring censorship of prayer. It could also convey a message of governmental disapproval of religions whose adherents feel compelled to address political issues.

Procedural Due Process Claim

Because in my view, the district court erred in entering summary judgment against Snyder's federal Establishment Clause claim, I also dissent from the majority's conclusion that because Snyder was not deprived of any protected interest, his due process claim fails.

Supreme Court, U.S.
FILED
OFFICE

No. 98-1193

In The Supreme Court of the United States

October Term, 1998

TOM SNYDER,

Petitioner,

vs.

MURRAY CITY CORPORATION, a municipal corporation, and H. CRAIG HALL, City Attorney,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a person has expressed his intention to proselytize and to disparage the beliefs of others by a "prayer" during the opening ceremony of a city council meeting, does a city violate the Establishment Clause by declining to invite him to offer that prayer?

LIST OF PARTIES

The United States intervened in this case in the district court solely to defend the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA") in which Mr. Snyder had based one of his claims. The district court granted summary judgment to defendants and did not reach Mr. Snyder's claim under RFRA or the defense that RFRA was unconstitutional. The United States did not participate in the initial appeal, did not participate in the *en banc* rehearing, and is not a party to this appeal.

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CITATION OF OPINIONS

Snyder v. Murray City Corp., 902 F. Supp. 1444 (D. Utah 1995) ("*Snyder I*") (reproduced at Petitioner's Appendix, beginning page 56a); *Snyder v. Murray City Corp.*, 902 F. Supp. 1455 (D. Utah 1995) ("*Snyder II*") (reproduced at Petitioner's Appendix, beginning page 79a); *Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997) ("*Snyder III*") (reproduced at Petitioner's Appendix, beginning page 87a); and, *Snyder v. Murray City Corp.*, No. 96-4087 (10th Cir. Oct. 27, 1998) (*en banc*) ("*Snyder IV*") (reproduced at Petitioner's Appendix, beginning page 1a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress.

First Amendment, United States Constitution: "Congress shall make no law respecting an establishment of religion . . . ."

Fourteenth Amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), the Utah Supreme Court held that the Utah Constitution did not prohibit a city council from opening its meetings with a prayer. The plaintiff there challenged the tradition on state constitutional grounds only. During the pendency of *Whitehead*, Murray City (the "City") suspended its tradition of opening its council meetings with a prayer. *Snyder IV*, Appendix at 3a.[1]

After *Whitehead* was decided, the City resumed its tradition which it had otherwise long maintained. Prayers were offered by members of religious communities in and around the City, including various members of Judeo-Christian congregations, Zen Buddhists, and Native Americans. Each person who

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[1] All citations to the record reference the decisions that are reproduced in Petitioner's Appendix.

offered a prayer did so at the initial request of the City Council, usually in response to a form letter the Council had circulated to local religious organizations. Prior to the events at issue in this case, the City had never received an unsolicited request from a private individual to give a prayer at a council meeting. *Snyder IV*, Appendix at 3a-4a.

Mr. Snyder was offended by the City's tradition. The decision in *Whitehead* and the resumption of the tradition prompted Mr. Snyder to draft the following "prayer" and request permission to give it as the invocation to open a council meeting:

> OUR MOTHER, WHO ART IN HEAVEN (IF, INDEED THERE IS A HEAVEN AND IF THERE IS A GOD THAT TAKES A WOMAN'S FORM) HALLOWED BE THY NAME, WE ASK FOR THY BLESSING FOR AND GUIDANCE OF THOSE THAT WILL PARTICIPATE IN THIS MEETING AND FOR THOSE MORTALS THAT GOVERN THE STATE OF UTAH;
>
> WE FERVENTLY ASK THAT YOU GUIDE THE LEADERS OF THIS CITY, SALT LAKE COUNTY AND THE STATE OF UTAH SO THAT THEY MAY SEE THE WISDOM OF SEPARATING CHURCH AND STATE AND SO THAT THEY WILL NEVER AGAIN

PERFORM DEMEANING RELIGIOUS CEREMONIES AS PART OF OFFICIAL GOVERNMENT FUNCTIONS;

WE PRAY THAT YOU PREVENT SELF-RIGHTEOUS POLITICIANS FROM MIS-USING THE NAME OF GOD IN CONDUCTING GOVERNMENT MEETINGS; AND, THAT YOU LEAD THEM AWAY FROM THE HYPOCRITICAL AND BLASPHEMOUS DECEPTION OF THE PUBLIC, ATTEMPTING TO MAKE THE PEOPLE BELIEVE THAT BUREAUCRATS' DECISIONS AND ACTIONS HAVE THY STAMP OF APPROVAL IF PRAYERS ARE OFFERED AT THE BEGINNING OF GOVERNMENT MEETINGS;

WE ASK THAT YOU GRANT UTAH'S LEADERS AND POLITICIANS ENOUGH COURAGE AND DISCERNMENT TO UNDERSTAND THAT RELIGION IS A PRIVATE MATTER BETWEEN EVERY INDIVIDUAL AND HIS OR HER DEITY; WE BESEECH THEE TO EDUCATE GOVERNMENT LEADERS THAT RELIGIOUS BELIEFS SHOULD NOT BE BROADCAST AND REVEALED FOR THE PURPOSE OF IMPRESSING OTHERS; WE PRAY THAT YOU STRIKE DOWN THOSE THAT MIS-USE YOUR NAME AND THOSE THAT CHEAPEN

THE INSTITUTION OF PRAYER BY USING IT FOR THEIR OWN SELFISH POLITICAL GAINS;

WE ASK THAT THE PEOPLE OF UTAH WILL SOME DAY LEARN THE WISDOM OF THE SEPARATION OF CHURCH AND STATE; WE ASK THAT YOU WILL TEACH THE PEOPLE OF UTAH THAT GOVERNMENT SHOULD NOT PARTICIPATE IN RELIGION; WE PRAY THAT YOU SMITE THOSE GOVERNMENT OFFICIALS THAT WOULD ATTEMPT TO CENSOR OR CONTROL PRAYERS MADE BY ANYONE TO YOU OR TO ANY OTHER OF OUR GODS;

WE ASK THAT YOU DELIVER US FROM THE EVIL OF FORCED RELIGIOUS WORSHIP NOW SOUGHT TO BE IMPOSED UPON THE PEOPLE OF THE STATE OF UTAH BY THE ACTIONS OF MIS-GUIDED, WEAK AND STUPID POLITICIANS, WHO ABUSE POWER IN THEIR OWN SELF-RIGHTEOUSNESS;

ALL OF THIS WE ASK IN THY NAME AND IN THE NAME OF THY SON (IF IN FACT YOU HAD A SON THAT VISITED EARTH) FOR THE ETERNAL BETTERMENT OF ALL

OF US WHO POPULATE THE GREAT STATE OF UTAH.

AMEN.

Snyder IV, Appendix at 4a n.3.

The City's Attorney, defendant Hall, told Mr. Snyder the text of the proposed prayer was unacceptable and the City would not invite Mr. Snyder to give the prayer during the Opening Ceremony.[2] Mr. Snyder then filed this lawsuit. His claim was that "in branding his particular prayer 'unacceptable' and preventing him from offering it as part of the official 'reverence period' of the municipal council meeting, Murray City impermissibly preferred one religion over another." *Snyder IV*, Appendix at 7a-12a.

Mr. Snyder's lawsuit did not include a claim for violation of his rights under the Speech Clause of the First Amendment.

ARGUMENT WHY THE CASE SHOULD NOT BE REVIEWED BY THE COURT

There are no compelling reasons for the Court to grant the Petition for Writ of Certiorari. The Tenth Circuit Court of Appeals' decision is not in conflict with the decision of another

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[2] Mr. Hall informed Mr. Snyder he could give the "prayer" during the "public comment" portion of the meeting, which immediately followed the opening ceremony, or as an agenda item. Mr. Snyder chose neither alternative. *Snyder I*, Appendix at 57a-59a; *Snyder III*, Appendix at 91a.

United States court of appeals on the same matter. As discussed under I and II below, the Tenth Circuit Court of Appeals' *en banc* decision correctly applies precedent from this Court and otherwise does not depart from the accepted and usual course of judicial proceedings. Finally, as discussed under III below, the Tenth Circuit Court of Appeals' decision is not in conflict with a decision of the Utah Supreme Court.

I. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THE ISSUE IS GOVERNED BY *MARSH V. CHAMBERS*, 463 U.S. 783 (1983).

The manner in which the City carries out its tradition of having an Opening Ceremony is governed by *Marsh v. Chambers*, 463 U.S. 783 (1983), and does not violate the Establishment Clause. Prayers at the beginning of a legislative session are governmental expressions that constitutionally acknowledge the Country's religious heritage. These kinds of "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

Ceremonial prayers before legislative bodies are expressions by and on behalf of those bodies. In *Snyder IV* the Tenth Circuit Court of Appeals correctly interpreted *Marsh* as identifying a "genre" of legislative invocational prayer that "has become part of the fabric of our society" and constitutes a

"tolerable acknowledgment of beliefs widely held among the people." *Snyder IV*, Appendix at 17a-18a (quoting *Marsh*, 463 U.S. at 792). This Court identified boundaries of the genre beyond which the prayer becomes constitutionally intolerable: when "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95. Taking it one step further, this Court explained in *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 603 (1989), that "not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." Thus, "the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine. When a legislative invocation strays across this line of proselytization or disparagement, the Establishment Clause condemns it." *Snyder IV*, Appendix at 19a.

Legislative prayers cannot exist without the government selecting someone to offer them. *Marsh* must be read to mean the City does not violate the Establishment Clause by choosing who may offer the invocational prayer to open a council meeting. *Marsh* must also be read to mean the City does not violate the Establishment Clause by choosing not to invite someone to give an invocational prayer to open a City Council meeting after that person has announced his intention to give a prayer that is incompatible with the legitimate governmental purposes for having the tradition and falls outside the identified boundaries of the genre. Reserving time at the commencement of legislative

sessions for an Opening Ceremony, which includes lofty thoughts or prayers to encourage high-mindedness, solemnity and attention to agenda items, is constitutional under the Establishment Clause per *Marsh*. Declining one's request to give the Opening Ceremony in a fashion that is incompatible with the official purpose for reserving the constitutional practice is no more an endorsement of religion under the Establishment Clause than is having the practice itself. Here, there was incompatibility between the nature of the speech and the functioning of the "non-public forum," discussed below. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 808-09 (1985).

Implicit in *Marsh* is that the traditional Opening Ceremony is a non-public forum that is reserved for official government uses. There, "[t]he Nebraska Legislature beg[an] each of its sessions with a prayer offered by a chaplain who [was] chosen biennially by the Executive Board of the Legislative Council and [was] paid out of public funds." 463 U.S. at 784-85. A Presbyterian minister had served as chaplain since 1965 at a salary of $319.75 for each month the legislature was in session. His prayers were recorded in the Legislative Journal and collected from time to time in prayer books that were published at public expense. *See id.* A legislator challenged the practice on Establishment Clause grounds, claiming a violation because (1) a clergyman of the same denomination had been selected for 16 years, (2) he was paid with public funds, and (3) the prayers were in the Judeo-Christian tradition. *Id.* Conducting an extensive

review of the histories of the United States Congressional and Senatorial Chaplaincy practices and those of states and colonies, this Court held that the Nebraska Legislature's chaplaincy practice did not violate the Establishment Clause. *Id.* The Court acknowledged that the United States Congress had, since the First Congress drafted the First Amendment almost 200 years before, opened sessions of Congress with prayer. *Id.* The Court explained that in light of history, this practice had become a part of the fabric of society, and that to invoke divine guidance on a public body entrusted with making the laws was not a violation of the Establishment Clause. *Id.* Rather, it was a tolerable acknowledgment of beliefs widely held among people of this Country.[3] *See id.* at 787-92. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.* at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the

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[3] In *Abington School District v. Schempp*, 374 U.S. 303, 303-04 (1963), the Court identified several references to the religious heritage of the Nation in many statutorily and officially sanctioned symbols, such as the national motto, "In God We Trust," which graces American currency, "One nation under God," as part of the Pledge of Allegiance to the American Flag, art galleries supported by public revenues which display centuries-old religious paintings that were inspired predominantly by one religious faith, and others. Even the United States Supreme Court Chambers "in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments." *Lynch v. Donnelly*, 465 U.S. 668, 676. *See also Marsh v. Chambers*, 463 U.S. 783, 786 (1983) ("In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court").

Establishment Clause arising from a practice of prayer similar to that now challenged."[4] *Id.* at 791.

Comparing the Nebraska Legislature's practice to that of the United States Congress, the Court concluded it would be incongruous to interpret the Establishment Clause as imposing more stringent First Amendment limits on the states than the draftsmen had imposed on the federal government. *See id.* at

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[4] In *Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984), decided the year after *Marsh*, the Supreme Court explained:

> A significant example of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Cause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate. In *Marsh v. Chambers*, 463 U.S. 783 (1983), we noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official Legislative Chaplains to give opening prayers at sessions of the state legislature.
>
> It is clear that neither the seventeen draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

793-95.[5] Moreover, the Court concluded that the Nebraska Legislature's longstanding practice of selecting the same Presbyterian minister, and even paying him at public expense, did not invalidate the practice. *See id.*

The purpose of the Nebraska's chaplaincy practice was, through traditional and ceremonial observance, to establish an appropriate mood for participants and to invoke divine guidance. By selecting the same minister year after year from a specific Christian denomination as the chaplain to pray before each legislative session, the Nebraska Legislature limited the diversity of expression that would occur in favor of a single mouthpiece. The United States Congress and Senate had similar practices in which the same Christian Chaplains served for extended periods of time, creating the same limitations of diversity. *See id.* at 793-94 & n.17.

In this case, rather than selecting and paying a single council chaplain to offer prayer at the beginning of each council meeting, Murray City's tradition was to select and invite participants from a number of religious and other groups and associations to provide the Opening Ceremony at no public expense. Following Mr. Snyder's argument to its logical end would result in an anomalous conclusion: using public monies to pay a chaplain from a single Christian denomination to pray at the

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[5] Some states chose a chaplain to serve for the entire legislative session. Other states selected different clergy to give the prayer each day, much like the City's tradition and practice. *See* 463 U.S. at 794 n.18.

beginning of legislative sessions is not offensive to the Establishment Clause, but inviting representatives from diverse groups over time to give the same Opening Ceremonial thought or prayer and achieve the same objective at no public expense is.[6]

Finally, tension exists between the Establishment and Free Speech Clauses. Avoiding an Establishment Clause violation is a legitimate state interest, in some circumstances, for limiting religious speech. This Court has recognized that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995). Allowing Mr. Snyder to give his "prayer," which proselytized and disparaged others, and therefore was incompatible with the purpose for the non-public forum, would have violated the Establishment Clause. *See Snyder IV*, 19a, 22a. And, if not, allowing such proselytization and disparagement would have opened the forum from non-public to designated public, opening the forum to other than official government uses and making it indistinguishable from the other portions of the council meeting. See II, *infra*.

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[6] Granted, Murray City Council is not the United States Senate, the United States Supreme Court or the Tenth Circuit Court of Appeals. But it is a legislative body that governs pursuant to constitutional and statutory mandate. If certain traditions are recognized as constitutional at the highest and most visible levels of government, a local, less visible legislative body should be entitled to no lesser privileges under the same constitutional analysis.

II. MR. SNYDER'S CLAIM DOES NOT SOUND IN THE SPEECH CLAUSE. UNDER A FORUM ANALYSIS, HOWEVER, HIS CLAIM FAILS BECAUSE ALLOWING THE PRAYER WOULD HAVE EITHER VIOLATED THE ESTABLISHMENT CLAUSE OR OPENED THE FORUM FOR OTHER THAN OFFICIAL GOVERNMENT USES.

Mr. Snyder contends that the manner in which the City conducts its Opening Ceremony creates a "designated limited public forum" for the expression of religious ideas. Petition, pp. 8-10. Having so created the forum, he contends, the City was precluded under a strict scrutiny analysis from declining to invite him to give his "prayer" as the Opening Ceremony of the city council meeting. *See id.*

The three-part forum test identified in speech cases is not the appropriate analysis because Mr. Snyder made no speech claim. The test under *Marsh* provides the proper analysis. However, the City and Mr. Hall address the facts under the forum test because Mr. Snyder has used the speech analysis in his Establishment Clause claim by urging that the nature of the forum bears on the issue whether declining to invite Mr. Snyder to offer the invocation to open the city council meeting violated the Establishment Clause. In short, the Opening Ceremony was a non-public forum, and despite the protected character of Mr. Snyder's speech, the City properly declined to invite Mr. Snyder to pray because his proffered prayer proselytized, disparaged others, and fell outside the boundaries of the genre of acceptable legislative prayer. The government is justified in

reserving the forum as non-public for official government uses. Allowing the prayer would either have violated the Establishment Clause or changed the character of the forum, which the City was not required to allow.

The analysis Mr. Snyder advances was developed for assessment of claimed free speech violations. In cases involving governmental suppression of otherwise protected religious speech, the Establishment Clause analysis has generally been limited to whether the governmental entity's efforts to avoid an Establishment Clause violation constituted a legitimate reason to suppress the speech, and *not* whether the suppression itself violated the Establishment Clause. Courts have recognized that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995).

Capitol Square utilized an analysis similar to that Mr. Snyder advances, and precisely because plaintiff there had not alleged a speech violation, this Court refused to consider whether the City's disagreement with the Ku Klux Klan's political agenda was a basis for denying the request: "the . . . facts before [the Court] and the opinions below address[ed] only the Establishment Clause issue . . . ."[7] *Id.* at 760. There, the Court conducted an analysis similar to that in speech cases only because the nature of the forum was critical to assessing whether the state's allowing

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[7] Disagreement with the political agenda was not an element of the Establishment Clause Claim, but would have been an element of a Speech Clause claim.

the Ku Klux Klan to display its cross on government property would create an official endorsement of Christianity in violation of the Establishment Clause. Had the Square been a non-public forum, as is the Opening Ceremony at the city council meetings, instead of a public forum, allowing the display would likely have violated the Establishment Clause.[8]

Under this Court's three-part analysis for speech claims as well as the analysis of *Marsh*, declining Mr. Snyder's uninvited request to give his "prayer" during the Opening Ceremony did not violate the Establishment Clause:[9] (1) Was Mr. Snyder's proposed expression protected speech under the First Amendment? (2) if so, what was the nature of the forum in which Mr. Snyder sought to make the expression? (3) in light of the nature of the forum, by declining Mr. Snyder's request because it fell outside

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[8] Mr. Snyder's claim presents a slightly different question. Rather than assessing whether allowing his expression violates the Establishment Clause by endorsing religion as in *Capitol Square*, the question here is whether declining his request violated the Establishment Clause by disfavoring his "religion" or favoring other religions. To the extent allowing Mr. Snyder's request would have violated the Establishment Clause, a *Capitol Square* analysis applies.

[9] In *Capitol Square*, the Court first found that the religious display was private expression under the First Amendment and that religious expression was entitled to be as fully protected under the Free Speech Clause as is secular private expression. *See* 515 U.S. at 760-61. The Court found that the City's justification for excluding the unattended religious display was because its content was religious and it wanted to avoid official endorsement of Christianity, as required by the Establishment Clause. Although compliance with the Establishment Clause is considered a state interest sufficiently compelling to justify content-based restrictions on speech, the Court concluded that because of the nature of the forum—a traditional public forum—it was open to a broad spectrum of groups that would provide only incidental benefit to religion. *See id.* at 762-64.

the genre of acceptable legislative prayer, did the City violate the Establishment Clause? *See Capital Square*, 515 U.S. at 760-68.

The City concedes Mr. Snyder's proposed "prayer" was speech, including protest speech, entitled to protection by the Speech Clause. However, "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum . . . ." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (citing *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). Indeed, content-based discrimination is permissible in a non-public forum if it reserves the purpose of the forum. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995).

This Court has categorized government property into the three distinct fora: (1) traditional public forum; (2) designated public forum; and (3) non-public forum.

The first category—traditional public fora—consists of places such as "streets and parks, 'which have immemorially been held in trust for the use of the public, and, time out of hand, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[10] *Perry*

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[10] Under a speech analysis, in a traditional public forum content-based regulations are subject to heightened scrutiny, i.e., the government must show that the regulation is "necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). Content-neutral regulations must be "narrowly tailored to serve a

Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

This Court defined the second category—designated public forum—as property the government has opened for expressive activity, treating the property as if it were a traditional public forum. *See id.* at 45-46 & n.7. A designated public forum may be created for a "limited purpose" for use "by certain speakers, or for the discussion of certain subjects." *Id.* at 46 n.7. Unlike a traditional public forum, the government "is not required to indefinitely retain the open character" of a designated public forum.[11] *Id.* at 46.

This Court explained the third category—non-public forum—as "[p]ublic property which is not by tradition or designation a forum for public communication. . . ." *Id.* The government may limit speech in a non-public forum to reserve the forum for the specific official uses to which it is lawfully dedicated.[12]

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significant government interest, and leave open ample alternative channels of communication." *Id.* (citing *United States Postal Serv. v. Council of Greenbaugh Civic Ass'ns*, 453 U.S. 114, 132 (1981)).

[11] Under a speech analysis, this Court explained that so long as the property is designated as a public forum, the government is "bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 & n.7 (1983). Thus, content-based regulations must be narrowly drawn to effectuate a compelling state interest and reasonable time, place, and manner regulations are permissible. *See id.*

[12] This Court explained the level of scrutiny, under a speech analysis, for regulating speech in non-public fora. Regulations of speech in a non-public forum are subject to the more deferential reasonableness standard. This does not

In this regard, the Court in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), gave additional guidance:

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." . . . In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . .[13]

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mean the government has unbridled control over speech, however, for it is axiomatic that "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Thus, "[c]ontrol over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985).

[13] Once again, because Mr. Snyder has not alleged a speech claim, this Court should not consider whether the City disagreed with the expression as the basis for declining his request to give the Opening Ceremony of the City Council Meeting, as explained in *Capitol Square*, 515 U.S. at 559-60. Rather, the Court should consider only whether declining his request because it was incompatible with the reasons for having the Opening Ceremony violated the Establishment Clause. However, the City's conduct in declining to invite Mr. Snyder to give his "prayer" during the Opening Ceremony was solely to reserve the forum for

> As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Id. at 46 (quoting *United States Postal Service v . Greenburgh Civic Ass'n*, 453 U.S. 114, 129, 131 n.7 (1981), *Greer v. Spock*, 424 U.S. 828, 836 (1976), and *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

The Court in *Cornelius v. NAACP Legal Defense & Educational Fund. Inc.*, 473 U.S. 788 (1985), added:

> The Government's decision to restrict access to a non-public forum need only be reasonable; it need not be the most reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and functioning of the non-public forum is not mandated. . . . Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. The First Amendment does not demand unrestricted access to a non-public forum merely because use of that forum may be the most efficient means of delivering the speaker's message. . . . Rarely will a non-public forum provide

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its intended purpose. Mr. Snyder was invited to give his "prayer" as an agenda item or during the public comment portion of the meeting.

> the only means of contact with a particular audience. Here . . . the speakers have access to alternative channels. . . .[14]

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[14] Here, Mr. Snyder had access to alternative channels. He was invited to give his "prayer" as an agenda item or during the public comment portion of the meeting. Significant disruption in the operation of government would otherwise ensue. For example:

> By selecting a chaplain or clergy person(s) from a single or limited number of Christian denominations, did the Nebraska Legislature, the United States Senate or the Congress create a forum, no longer restricted to official government uses, which requires them to allow any and all comers to express their offense to public prayer *during* the ceremony?
>
> Having a ceremonial recitation of the Pledge of Allegiance by participants at a city council meeting or a legislative session, which includes the language "One Nation under God," does a public body create a forum, no longer restricted to official government uses, requiring the body to allow anyone who desires to express his or her offense at such reference to deity *during* the ceremony?
>
> By gracing the United States Supreme Court chambers with a painting of Moses with the Ten Commandments, has the Court created a forum in which it must allow citizens to display any or all religious visual expressions they wish, including protest?
>
> By opening this Court with the invocation "God save the United States and this Honorable Court," does the United States Supreme Court create a forum for any Court observer or participant to interrupt, comment or replace the invocation with an objection to any reference to God?
>
> By inscribing United States currency with the Motto "In God We Trust," has the federal government created a forum in which citizens who object to such mingling of religious expression with the governmentally-created monetary system must be free to deface or replace the currency?

In each instance, the government has reserved and restricted the forum to official government uses, and has not opened the forum to protest religious speech. There are other readily available avenues for such expression. Particularly in the area of prayer before legislative bodies, there is little question

Id. at 808-09 (citing *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) and *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)).

The forum to which Mr. Snyder was denied participation was the Opening Ceremony of the City Council Meeting. *See Cornelius v. NAACP Legal Defense And Education, Inc.*, 473 U.S. 788 (1985) (forum analysis is not completed merely by identifying the government property at issue, but includes the access sought by the speaker; the relevant forum was the charitable drive rather than the federal workplace). The Murray City Council reserved the forum for the specific official uses to which it was lawfully dedicated. The Opening Ceremony was a non-public forum, reserved by the City for a specific, limited purpose, the same as the invocations in the Congress, Senate and Nebraska Legislature.[15]

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that invitees serve at the discretion of the legislative body for an official purpose and that such prayers are uttered in furtherance of official government business.

[15] In *General Media Communications, Inc. v. Cohen*, 131 F.3d 273 (2d Cir. 1997) (Petition for Certiorari filed March 16, 1998 (No. 97-1535)), the court gave further analysis of non-public fora, as follows:

> Governmental intent is said to be the "touchstone" of forum analysis. . . . The government does not create a public forum "by inaction or by permitting limited discourse," . . . and when the state reserves property for its "specific official uses," it remains non-public in character . . . . [E]vidence that the government has created a forum to further efficiency and administrative convenience suggests that the forum is non-public. . . . It is also well established that the presence of some expressive activity in the forum does not, without more, render it a public forum.

The City's decision to restrict Mr. Snyder's access to the Opening Ceremony by declining to invite him to give his prayer was reasonable. As discussed under Part I above, there was strict incompatibility between the nature of Mr. Snyder's proposed speech and the proper functioning of the non-public forum even though a strict incompatibility was not required. Inviting Mr. Snyder to give a prayer that proselytized and disparaged and therefore exceeded the boundaries of appropriate legislative prayer would have violated the Establishment Clause or resulted in the loss of reservation of the Opening Ceremony for official government uses.

III. *SNYDER IV* IS NOT IN CONFLICT WITH THE UTAH SUPREME COURT'S DECISION IN *SOCIETY OF SEPARATIONISTS, INC. V. WHITEHEAD*, 870 P.2D 916 (UTAH 1993).

Snyder IV does not conflict with the Utah Supreme Court's decision in *Whitehead*. The Society of Separationists did not include a claim under the Establishment Clause of the First Amendment to the United States Constitution. Rather, the Society of Separationists focused solely on the religion clause of the Utah Constitution which provides, in part:

Id. at 279 (quoting and citing, among others, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992), *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992), *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985), *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995), and *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981)).

> [1] There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. [2] No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Utah Const. art. I, § 4. The Utah Supreme Court was not bound to use an analysis under *Marsh* or *Lemon v. Kurtzman*, 403 U.S. 607 (1971), because no federal Establishment Clause issue was presented, and the language of the religion clause of the Utah Constitution differs markedly from that of the Establishment Clause. The Court explained:

> While we agree that the *Marsh* decision might control here if the Council's practice were being challenged as a violation of the federal constitution, it does not control our analysis under the Utah Constitution, with its broader and more detailed prohibitions.

Whitehead, 870 P.2d at 930.

> The City Council . . . urges upon us the United States Supreme Court's precedent in the area of legislative prayer, *Marsh v. Chambers*, 463 U.S. 783 . . . (1983), or the Court's analytical framework developed in *Lemon v. Kurtzman*, 403 U.S. 602 . . . (1971).

> . . . The federal rulings set the floor for federal constitutional protections which we must respect in interpreting the scope of our own constitution's provision. But the federal courts have an entirely different task before them than do we. They have only a cryptic sentence to interpret; we have paragraphs that are expressed in clearer terms and that are given even more vivid meaning by our unique and relatively recent history. The citizens of Utah know, perhaps better than those of any other state, what evils can befall people, communities, and government when religious strife is pervasive.

Whitehead, 870 P.2d at 940.

Addressing the Separationists' claim that invocational prayers to open City Council meetings appropriated public money and property for religious worship in violation of the second part of the religion clause quoted above, the Utah Supreme Court used a two-step analysis of constitutional neutrality. *See id.* at 938-39. The Court derived the analysis by examining precedent from other jurisdictions and Utah's unusual history. *Id.* The analysis was that use of public money or property that benefits religious worship, exercise, or instruction or any ecclesiastical establishment qualifies as an indirect benefit and survives state constitutional scrutiny only if it meets two requirements. First, the money or property must be provided on a nondiscriminatory basis. Second, the public money or property must be equally accessible to all. *Id.* The Utah Supreme Court held:

> First, we conclude that the expenditures made in connection with the arrangement for and provision of facilities for opening remarks were provided on a nondiscriminatory basis. The expenditures were not for the religious exercise itself, but for the meeting and that portion of the agenda that consists of generic opening thoughts, some of which may include prayers. Furthermore, the Separationists have not shown that the City Council favored particular religions or religion in general in scheduling participants. To the contrary, the record indicates that the City Council made efforts to assure that a broad cross-section of the community was represented. We conclude that any use of public money or property for facilitating the giving of opening remarks was made on a nondiscriminatory basis without regard to the belief systems of the speakers. Second, the Separationists have not shown that the City Council's policy denied any group or individual a realistically equal opportunity to participate in favor of particular religious groups or speakers or of religious speakers in general. In fact, the record shows that the resource here is not one that had to be allocated; there were more opportunities in the schedule for participants to give opening remarks than there were interested speakers.

Id. at 938-39.

Addressing the Separationist's claim that the language in the Utah Constitution "[t]here shall be no union of Church and state, nor shall any church, dominate the state or interfere with its functions," requires an absolute separation of church and state, the Court explained:

> Rather, the language is a particularistic command directed at the Mormon Church as an institution and was intended to forever bar the sort of theocracy that existed in the early days of the State of Deseret by preventing that church, or any other church as an institution, from "interfer[ing]" directly in or "dominat[ing]" state government. Based on this reading, we conclude that the union-of-church-and-state ban applies only to circumstances that join a particular religious denomination and the state so that the two function in tandem on an ongoing basis. There is no evidence in the record to support a claim that such a union exists or, alternatively, that the City Council's policy could be construed as allowing one religious denomination to dominate or interfere with city business. In fact, the record indicates no preference by the City Council for any religious group or for organized religion in general. Quite the contrary, a wide variety of religious groups, as well as some secular ones, have been represented in the opening ceremony.

Id. at 939.

Finally, the Utah Supreme Court's concluding comments unify that court's thinking with precedent from this Court by identifying a parallel between origins of the Country and of the State of Utah:

> On a deeper level, we do not agree with the Separationists that the framers of the Utah Constitution intended a complete separation between religion and the state, if complete separation means positive hostility as the Separationists seem to contend. . . . Such a complete separation in "every and all respects" would make the state and religion "aliens to each other—hostile, suspicious, and even unfriendly." . . . Such a result is clearly unnecessary to the goals of our state and federal constitutions and . . . is one that would produce consequences unintended by the framers and unheralded by our history. . . . This is a state, after all, that was settled by people with primarily religious motivations. Our early history is of the struggle between those with deeply held views on matters of conscience, whether grounded in orthodox religion or otherwise. The state that was created by the parties to this struggle plainly was not intended to be hostile to the foundation upon which most of its creators grounded their value systems—religion.

Id. at 939-40 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (Douglas, J.).[16]

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[16] This Court explained:

> It has never been thought either possible or desirable to enforce a regime of total separation [between church and state], and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court.

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973). The Court also explained in *Lee v. Weismann*, 505 U.S. 577, 598 (1992), that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." Indeed,

> [t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.

Abington School Dist. v. Schempp, 374 U.S. 303, 308 (1963) (Goldberg, J., concurring).

This Court has refused "to take a rigid, absolutist view of the Establishment Clause. We have refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.'" *Lynch*, 465 U.S. at 678 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970)). That objective, as quoted by the Court, "was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." *Id.* (quoting Joseph Story at 3 Story, Commentaries on the Constitution of the United States 728 (1833)). The "inquiry calls for line drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not write a statute.'" *Id.* (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

> The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Id. at 678-79 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

Where the Society of Separationists did not invoke the Establishment Clause and the Religion Clause of the Utah Constitution differs markedly from the Establishment Clause, *Snyder IV* is not inconsistent with the Utah Supreme Court's decision in *Whitehead*.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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